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WHITE COLLAR CRIME
CAN THE
COURTS HANDLE IT?

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WHITE COLLAR CRIME – CAN THE COURTS HANDLE IT?

CHAIRMAN

William Clifford, Director,
Australian Institute of Criminology, Canberra

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OPENING ADDRESS

The Honourable K. E. Enderby, Q.C.
Attorney-General of Australia and
Minister for Customs and Excise

Mr Chairman, your Honours, ladies and gentlemen, may I say at the outset that it is a very great pleasure to have the opportunity to give the opening address on 'White Collar Crime – Can the Legal Process Handle It?' It is a question to which I will not attempt to provide an answer, and I regret that I will not be able to stay to hear the answers that are going to be given by some of the contributors.

There can be little doubt that it is a subject of increasing concern to people today. There is the traditional concept of crime as a form of behaviour that can be made the subject of study: on socio-economic grounds, on biological grounds, on psychiatric grounds and so on. I do not claim to have any great expertise in the subject. Many years ago I undertook a course with Mannheim in London, and tonight with complete conviction (or utterance of modesty) I brought with me my own guide to criminology, *The Honest Politician's Guide to Crime Control** which has some discussion of the topic.

The impact of new forms of crime are going to be considered by the Fifth United Nations Congress on Crime to be held in Toronto in September, 1975. The Congress will consider amongst other things changes in forms and dimensions of criminality. It will draw attention to the changing shape and the size of the crime problem and, one hopes, stimulate thinking about policies for its more effective reduction and containment. In proposing this item for discussion the Secretariat of the United Nations has observed that the modern rise of crime in many countries appears to be related to a period of exceptional rapid social and technological change. It is my understanding that this refers to crime of all forms, not only white collar crime.

What is white collar crime? The late Professor Sutherland in 1940 coined the phrase 'white collar crime' intending it to define the crimes committed by persons of respectability and high social status in the course of their business occupations. The phrase has since been extended by writers to cover violations of financial trust such as embezzlement, and offences that violate the well-being of the national welfare such as blackmarket operations. It has been suggested that the term should be regarded as applying to any occupational deviation and violation of professional ethics. It encompasses company frauds, large scale embezzlement and misappropriation of moneys, distribution of fraudulent securities, official corruption, consumer fraud, restrictive trade practices and a multitude of fraudulent acts that multiply as business ingenuity and complexity spirals.

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* Norval Morris & Gordon Hawkins, *The Honest Politician's Guide to Crime Control* (Chicago, 1970).

For instance, one of the great difficulties facing inspectors under A.C.T. Company Ordinances working in New South Wales is not only the complexity of the problem (when the money has to be followed through from one corporation to another) but also the problem of identifying who is the victim. Who complained? Who was hurt? Whence came the money? Who was robbed? The traditional features of a crime where the victim appears in the witness box are missing.

The National Crime Commission of the United States* estimated in 1967 that the economic cost of white collar crime dwarfs that of all other forms of crime. Overseas studies have shown that it is impossible to ascertain even approximately the amount of business crime because it is almost certain that only a small proportion of it is ever detected. The pervasiveness of white collar crime in the United States was emphasised by the National Crime Commission which referred to studies conducted by Professor Sutherland of breaches of the law by corporations. He found that some 980 adverse decisions had been rendered against 70 corporations under study. Another study examining blackmarket operations during World War II indicated that approximately one in every fifteen of the three million business concerns had serious sanctions imposed on them for violations of price regulations, and the evidence suggested that the total volume of violations was much larger than that indicated by officially imposed sanctions.

Lawyers certainly would appreciate the problem if one thinks about the world of tax. Tax avoidance is something to which many lawyers properly and professionally put their minds. Tax evasion is quite a different thing. One is a crime: one is not a crime. The line often is difficult to draw and sometimes crossed with drastic consequences.

White collar crime can affect society in a number of ways: for example, the breaches of laws concerning foods and drugs can cause death or serious injury, as can violation of safety laws and housing codes. It can result in huge financial losses such as occurs with the marketing of worthless or defective products: e.g. company frauds and sale of goods based on misrepresentation in advertising. Recent legislation coming out of the Australian Parliament has dealt with trade practices, consumer protection and, in particular, false advertising. You will all be familiar with the *Sharp* case which led to a plea of guilty and a conviction, which led in turn to a $100,000 fine for an offence arising out of false advertising.

The American Crime Commission Report estimated that price fixing by twenty-nine electrical equipment companies alone had probably cost public utilities – that is, the public – more money than is reportedly stolen by burglars in the United States in a whole year. There is an example of the serious damage that may be done by white collar crime to a nation's social, economic and political institutions.

* *The Challenge of Crime in a Free Society.*
A Report by the President's Commission on Law Enforcement and Administration of Justice (Washington D.C. 1967).

The crimes that mostly attract the attention of the public are crimes which threaten people in the streets or in their homes. These are crimes which involve the disadvantaged persons in our community and which occupy most of the attention of our law enforcement authorities, our courts and our prisons. White collar crime is less obvious to the public. It is harder to detect. Much less attention is therefore given to it by our law enforcement authorities and our courts.

I find myself thinking of another situation that can arise in public life. It is certainly not a crime but has been given recent publicity. Section 44 of our Constitution raises the question of pecuniary interests affecting politicians. That is certainly not a criminal form of behaviour although the law provides for a common informer type of action. In 1900, a common informer if he could prove a case was entitled to recover £100 for each day a member of Parliament sits while disqualified. This would have involved a very considerable fortune as well as invoking the sanction of disqualification, or possible disqualification. This is another illustration of the emerging concern that can be expressed by the community.

Business crime has certain characteristics. The area dealt with is often of a highly technical nature and of considerable complexity and may involve sophisticated questions of financial management, accounting, commercial and industry practices. Often there is no identifiable victim; it is the general public, or victims who do not know that they have been victimised. There is no victim who complains. The complaint may be brought by a journalist, or often by a politician. Sometimes the motives are not really related to simply putting a situation right; it might be a baser motive that motivates the complainant.

The evidence of the commission of the crime and the evidence necessary to prove the commission are usually in the control and possession of the suspect himself. The discovery of the crime in itself is difficult and unusual, unlike the case of traditional crimes where the commission of an offence is obvious: e.g. the presence of the body or the missing goods. The defendant in such proceedings may in many instances be a corporate entity. Questions then arise such as 'Is liability and intent to be imputed to the company?' or 'What is to be the position of the Board of Directors?' or 'What type of punishment is to be imposed?'. All these factors must be dealt with by the legal process, but it has to have the necessary flexibility to deal with them in an appropriate manner. To investigate and take action against the total impact of white collar crime it would be necessary to make a comprehensive analysis of virtually every aspect of the business life of the community. I believe that that would be impossible and probably unacceptable to the community. It is clear however that studies of this kind are needed and a number of initiatives have been taken and are in contemplation by not only the Australian Government but also the various State Governments.

The law of *caveat emptor* is widely believed to be inappropriate in a complex economic community. Accordingly the *Trade Practices Act* contains provisions about misleading and deceptive conduct in trade and commerce.

The Act seeks to deal comprehensively with restrictive trade practices including arrangements and understandings such as price fixing agreements, collusive tendering, market sharing agreements and collective boycotts.

Other legislation before the Senate is the proposed law on corporations and securities. The Bill deals with such practices as market manipulation, insider trading, short selling, certain dealings which involve conflict of interest situations and other matters. The Bill imposes both criminal and civil liability in respect of untrue statements in prospectuses. There is no need for a conviction to be obtained before a civil remedy arises and it will not be necessary for a person to establish that he relied on the false or misleading statement.

Experiences of recent years have shown that it is not sufficient merely to introduce laws which provide remedies. All too often experience has shown that the remedies proved to be worthless either because the trail of the offender is well covered or assets are placed beyond the reach of people who have been defrauded. There is a need for more emphasis on the prevention of fraudulent conduct. The Bill seeks to do this in a number of ways, mainly by the establishment of a strong administrative agency, The Corporations and Exchange Commission, which will have access to relevant information and effective powers to intervene where intervention appears to be desirable.

Other measures to assist in dealing with the white collar criminal could well be considered should pecuniary penalties be indexed. I mentioned the case of the common informer action provided for the Constitution; £100 back in 1900, and £100 in 1975. A Bill which became law last week reduced the $200, as it now is, from a *per diem* basis to a liquidated sum of simply $200 for previous offences with $200 continuing into the future once the subsequent offence or the charge has been made known to the person receiving the charge.

Should increasing emphasis be placed on civil remedies as well as on criminal remedies? Should provisions be introduced to permit class actions? Should the cost of investigation as well as legal aid be provided for? Should the rules of evidence be modified to enable expert witnesses to give evidence of the results of their investigations of documentary material as suggested by Sir Richard Eggleston? I have no doubt that some of your contributors will have quite a lot to say on these matters.

There is the question of Company Law generally. A closely related matter is the National Companies Bill which the Government proposes to introduce. It should be possible to prevent companies from continuing when their activities are clearly contrary to the public interest and they are clearly in breach of some law. Close attention will be devoted to this matter in the preparation of the legislation.

I have mentioned the problems of shutting doors after the horse has bolted. In dealing with white collar crime it is of great importance to pay close attention to the area of extradition. There have been some changes made in that aspect of law in recent times. Recent cases illustrate the ease with which those engaged in certain types of activity can remove themselves unless effective extradition arrangements are entered into. The Australian Government amended the *Extradition Foreign States Act* in 1974 to enable the Act to be applied by regulation to foreign states in certain circumstances, notwithstanding that there is no extradition treaty in force with respect to these states. The Act was applied to Brazil by regulation pursuant to that amendment. If extraditions pursuant to these provisions are successful we shall have made a considerable step forward, and this development combined with efforts to negotiate new treaties we hope would make it more difficult for white collar criminals to escape justice by easy flight overseas.

There is another development which I would mention: that is the proposal of government to rationalise and amalgamate the various Australian Police Forces into a single Australia Police Force. One feature behind this proposal is the recognition of the problem caused by white collar crime, by corporate crime which bears little relationship to state boundaries.

Another Bill before the Parliament at the moment concerns the subject of racial discrimination. It would appear from the attitude of the Opposition parties in the House of Representatives that it will become law in the near future. There are parts of the Bill that will become part of the criminal law. Not corporate crime by any means, but certainly one would have to call it white collar crime.

White collar crime is on the agenda of all thinking people who are concerned with law making these days. One sees in the past a preoccupation with the traditional forms of crime, but increasingly the social cost to the community is being recognised as coming in large measure from white collar crime and corporate crime. Increasingly there is an awareness and a resulting demand for action. To assist in achieving this purpose seminars such as yours fulfil an extremely important role, and I have very much pleasure in being associated with you today, Mr Chairman, in giving the opening address.

THE EFFECTIVENESS OF EXISTING LEGAL PROCESSES AND WHAT THEY SHOULD BE

J. K. Ford, Q.C.,
Crown Prosecutor

> *a community, such as ours, ... cannot concede that any case is too complex or too extensive to be heard and determined in due process of law.*
>
> *R.* v *Mitchell (1971) V.R. 46 at p.64*

In the criminal jurisdiction there is an increasing number of protracted jury trials. This phenomenon is not confined to cases of white collar crime. But it is in such cases that complexity and attention to minute detail become most pressing and are likely to result in a protracted hearing. Under the broad title of this paper I propose to raise for consideration two matters:

1. whether pre-trial procedures may be used more effectively to reduce the hearing time of the trial itself, and

2. whether it is feasible to ease the burden of fact-finding in such cases by introducing special juries or otherwise.

I take as a starting point an observation made by Sir Richard Eggleston in the admirable paper he presented in May 1974 to the Institute of Criminology, Sydney University Law School.

> *One of the most acute problems of the enforcement of the criminal law, especially in these days of legal aid, is the length of time that may be occupied in a criminal trial if the facts are complex, as they frequently are in company cases. (Syd. Inst. Crim. Proc. (1974) No. 19, p. 28)*

It would be folly to disregard such a warning until the occurrence of a huge trial places a well-nigh crushing burden on the trial judge and the jury.

Sir Richard referred to *Regina* v *Simmonds* (1967) 1 Q.B. 685; (1967) 2 All E.R. 399 and *R* v *Mitchell* (1971) V.R. 46. These were fraud cases in which the trials extended respectively for 81 days and 133 days.

It is idle to look wistfully at the Commercial Causes Jurisdiction of the Supreme Court and remark upon the speed and efficiency of its procedures without considering whether it is possible to borrow from the experience of that Court.*

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* See 'The Commercial Causes Court – A Judge's Viewpoint' by Mr Justice Macfarlan. 1 A.B.L.R. 192.

In particular is it possible to introduce into the criminal jurisdiction pre-trial procedures designed to narrow the issues and the areas of contention in the evidence and to reduce to a minimum the time taken at trial in deciding questions of admissibility?

In *R* v *Mitchell* (1971) V.R. 46 at 64 the Victorian Court of Criminal Appeal observed that:

> *the system will be frustrated and brought into public disrepute unless those concerned with the conduct of the trial have the courage and a sense of responsibility to take advantage of the means provided for delimiting the issues, such as Section 6 of the Evidence (Amendment) Act, 1965. In the present case it is plain beyond doubt, that in the result, proof according to the ordinary rules of evidence and a vast amount of public time and expense, could have been avoided by use of that section.*

In this State the section corresponding to that referred to by the Court, is s. 404 of the *Crimes Act* –

> *Every accused person on his trial may, if so advised by counsel, make any admissions as to matters of fact, whatsoever the crime charged, or give any consent which might lawfully be given in a civil case.*

The effective operation of this section would necessitate the preparation, before trial, by the Crown of a comprehensive list of 'admission' and/or 'consents' which the accused might reasonably be expected to make or give at trial. The list would be presented to the solicitor for the accused in ample time for the request to be considered, and agreement, if any, could be noted at a pre-trial conference or hearing before the judge.

In his paper (mentioned above) Sir Richard Eggleston was disposed to doubt that much could be achieved under the legislative provision mentioned by the Victorian Court of Criminal Appeal. 'The solution,' he said, 'is more likely to be found in a modification of the rule of evidence to enable expert witnesses to give evidence of the results of their investigations of documentary material. (see Appendix A, p. 13)

Before proceeding to consider the merits of a pre-trial hearing before the trial judge it is important to note (even though in passing) a valuable contribution to the law of evidence in the report of the Law Reform Commission (N.S.W.) on Business Records. Broadly speaking, the report recommends the more ready admission of business records, many of which are now computerised, subject to proper safeguards. The draft legislation also expressly provides for the admission of records from places outside New South Wales.

Pre-Trial Hearing?

In *Reg.* v *Simmonds* Fenton-Atkinson J. (on behalf of the Court of Appeal consisting of Sachs L.J., James J. and himself) devoted a substantial part of the judgment to a consideration of the steps that could be taken to reduce to a minimum, the possibility of a recurrence of the unduly protracted trial which had occurred. The first argument on the appeal advanced by Sir Peter Rawlinson, Q.C., for some of the appellants, was that the length and complexity of the trial was such that justice could not be done to the accused whatever care the Judge and jury took. The Court rejected this submission but noted that an inordinate strain had been imposed upon the trial judge and the jury by a combination of factors. The first of these was the fact that the indictment contained three conspiracy counts and three substantive counts. The trial judge faced with a mass of documents (including some 3,000 exhibits) in the course of a busy session at the Central Criminal Court had scant opportunity to analyse and test the view of the prosecution that it was necessary to have all six counts in the indictment. 'With the aid of hindsight', the Court observed, 'it is quite clear that the three individual substantive counts ought not to have been tried at the same time as the three conspiracies.' Furthermore one of the conspiracy counts should have been severed. The Court insisted that it is necessary for the trial judge to form an independent judgment on the severability of counts and must be given the time and opportunity to do so *before trial* ... 'hours thus spent may be matched by the saving of days of trial.'

A question of severability of counts does not always arise but a further observation of the Court appears to be of general application. 'What can be done to assist a judge faced with a monumental file of papers to assess the nature of the case without intolerable labour?'

The court indicated that 'whenever a long trial appears to be likely' certain steps should be taken e.g. for the transcript of the opening speech of counsel for the prosecution and of submissions (if any) by or on behalf of the accused at the committal proceedings should be made available to the trial judge. If such transcripts are available and are still relevant, well and good, but if they are not why should not the trial judge be entitled at least to have a summary of the opening of the Crown Prosecutor at the trial?

If it is desirable that the trial judge should be apprised of the case before trial, would it not also be desirable (after he is so apprised) to have a pre-trial hearing before him, attended by counsel for the parties with a view to ascertaining and perhaps narrowing the issues and the areas of contention in the evidence? Any admissions or consents pursuant to the *Crimes Act* s. 404 could be noted with a view to them being made formally at trial. Note could also be taken of any documents to which no objection would be made on tender at the trial. Would it also be feasible to hear argument at least in outline on the admissibility of documentary and other evidence? In instances where the admissibility of evidence depends on the credibility of witnesses e.g. in respect of admissions by an accused, legislation would be required to permit a *voir dire* examination before trial.

I regard such legislation as desirable because there is a significant number of cases in which the outcome of the *voir dire* examination necessarily results in the acquittal of the accused.

These various suggestions are made with a view to minimising the time spent by the jury out of court whilst questions of admissibility are being argued. It must be extremely irksome for jurors to be sent out of court, time after time during argument.

In *Reg.* v *Simmonds* the submissions made to the judge in the absence of the jury occupied 334 pages of transcript of which 221 pages were taken up by the submissions of one counsel. If the latter's submissions were on most occasions over-ruled (as appears to be the case) that fact could hardly have escaped the notice of the jury. At the very least could questions of relevancy be decided provisionally before trial?

The Jury

In *Reg.* v *Simmonds* the court paid a special tribute to the jury, in particular to the foreman, for the keen and accurate manner in which they followed the evidence. (But at the end of the trial only ten jurors were left in good health and during its concluding stages an attempt was made to bribe one of them.) The Court of Appeal agreed with the trial judge that despite its length the case was in essence a simple one. Furthermore a number of schedules had been prepared by the Crown, summarising the overall effect of the numerous documents in evidence. Suppose however that the case had been a complex one in a commercial setting? Would a jury selected without reference to previous experience or training in business, commerce, accountancy and such matters have been capable of following the course of the evidence with such keen interest? Is there a need for special juries or perhaps a special tribunal to deal with difficult cases?

This question has merited considerable attention in England.

See for example,

W. Cornish, *The Jury*. Penguin, London, 1968. P. 197 et seq.

Glanville Williams, *The Proof of Guilt*. Stevens, London, 1963. P. 298 et seq.

Karl Mannheim, 'Trial by Jury in Continental Law' (1937) 53 L.Q.R. P. 411.

Sir Trevor Humphreys, 'Do we need a Jury?' (1956) Crim. L. R. p. 457.

Sir Patrick Devlin, *Trial by Jury*. Stevens, London, 1965.

Dr Glanville Williams has considered the replacement of the jury by a panel of three judges or a tribunal consisting of a Judge and expert assessors in criminal cases generally. In this State however, an acceptable compromise may lie in having a special jury – selected according to experience and training in administration, business, commerce, etc. – to decide complex company and/or fraud cases. Professor Cornish points out (*The Jury* at p. 200) that in the early years of this century criminal prosecutions for fraud were tried by special jury. Sir Patrick Devlin (*Trial by Jury* at p. 167) notes that he 'had the melancholy distinction of presiding over the last (civil) trial with a City of London Special Jury'.

I venture the opinion that special juries are a necessity in complex fraud cases. If the concept of the special jury were accepted in principle by the legislature, the task of deciding the necessity for such a jury in any particular case would be assigned to a judge. The criteria for the selection of persons comprising the special jury list would require careful consideration. The list should be representative of a wide cross-section of the community including persons whose accountancy, managerial commercial or business experience is acquired in the administration of clubs, credit unions, co-operative societies and trade unions.

APPENDIX A

In reply to a letter from Mr Ford asking for his comments on pre-trial procedures and 'modification of the rule of evidence', Sir Richard Eggleston replied:

> With regard to the matters you raise, I did not explain my reasons for thinking that pre-trial conferences would not be of much assistance if their success depended upon the defence making admissions; in fact, my reason for expressing this view was that I do not think counsel for the accused can be expected to make admissions in this class of case when his best chance of success is to make the whole case so complicated that the jury is unable to say that it is satisfied beyond reasonable doubt. That is not to say that other pre-trial procedures might not be resolved upon with a view to shortening the length of the trial; for example, where there are voluminous documents, orders might well be made under some statutory power for a preliminary investigation of authenticity, reserving the question of authenticity for the jury only if the judge conducting the preliminary investigation decides that there is a real issue having a bearing on the guilt or innocence of the accused. In this way the documents could be brought into court already proved and merely tendered in evidence and read to the jury without the necessity of bringing a string of formal witnesses to vouch for them. Accordingly, while I do not think pre-trial procedures designed to elicit admissions from the defence are likely to be very productive, other pre-trial procedures could well be devised which would have the effect of saving much of the time taken in the presence of the jury. I should add on this point that I am not saying that a procedure for obtaining pre-trial admissions should not be introduced. There are cases in which the accused does not want to be saddled with unnecessary expense and in which the making of pre-trial admissions could be of great benefit to him from the point of view of saving costs.
>
> With regard to the second point, I do not think that it is sufficient merely to permit experts to prepare schedules from the basic documentary material. In my view there should be a special power in appropriate cases to authorise 'experts to conduct' an investigation, especially of books of account and similar material, and to report conclusions to the court. Of course, the accused person would have to have the opportunity to examine the material on which the expert based his report and to cross-examine the expert upon his report; but the mere presentation of schedules containing figures extracted from the documentary material, while it will undoubtedly save a good deal of time, will not necessarily give the jury the assistance to which they are entitled. However, even if the idea of allowing the expert to express opinions in such cases is not acceptable it would still be desirable to make it clear that schedules of figures derived from documents and perhaps also relevant extracts of those documents can be presented to the court without production of the documents themselves, provided that the documents are made available for

inspection if required and that copies of the schedules or extracts are given to the accused's representatives a reasonable time before the commencement of the case. If such a provision were made however, it would be almost essential that there should be some procedure for challenging the authenticity of the documents on which the schedules or extracts were based, which brings us back to my comment above, suggesting a pre-trial procedure of this kind.

With regard to the pre-trial determination of admissibility (e.g. of confessions) I see no reason why provision should not be made for questions of this kind to be determined before the trial itself, at the request of either party. Presumably some procedure would be needed under which the accused was required to notify his objection to material tendered by the prosecutor at the preliminary hearing. I think that the judge should still have a discretion to hear objections at the trial, notwithstanding the failure of the accused to challenge the evidence earlier.

The foregoing is a somewhat unconsidered statement of my views on these matters. In the light of the date you give for the Seminar I have thought it best to answer your letter at once. I have no objection to your quoting what I have said so long as you protect me by making it clear that what I have written was done in haste.

PRESENTATION OF PAPER

J. K. Ford, Q.C.

The solution of the problem is one that will depend upon the co-operation of people who are far more experienced than I am particularly in the field of Commercial Law, and who have considerable experience in the Commercial Causes jurisdiction of the Supreme Court. I am sure that a number of the trial judges, who have presided in recent years in long trials, would be able to contribute enormously towards at least a partial solution of the problem.

In my paper I have referred to the important contribution of the Law Reform Commission in 1973 in their Report on Business Records. So far as I am aware that particular report and recommendation has not yet passed into legislation. I should draw specifically to your attention that one of the sections of the draft legislation makes provision for questions of admissibility to be decided at any stage of a legal proceeding, and the note made by the learned authors is to this effect:

> *It is, we think important, for a court to have power to determine questions concerning admissibility before trial. It is often not practicable to do so but where it is expense, delay or inconvenience may be avoided.*

I was very pleased to find that particular comment because I had considered this question of argument of admissibility of evidence before trial without having the opportunity to see whether there was any material which recommended that particular procedure. I do not suggest that argument of questions of admissibility is a perfect solution. It is fraught with all sorts of difficulties, and one only has to spend some time in practice to understand the problem of predicting which questions are going to be the real questions or real issues. A question that is thought to be terribly important may, when it comes to the trial itself, turn out to be somewhat remote from the real issues in the case. If this suggestion is adopted as a realistic one it will require nice judgment on the part of counsel and judges to decide what matters are, in fact, matters that can be argued before trial.

Another aspect of the draft legislation is that specific provision is made for the admission of records from outside New South Wales. This seems to be an obvious point, and elementary, but it was a matter of importance in the case of *Mitchell* (1971) VR 46. In the early stages of the trial counsel for the prosecution sought to tender some bank records from the Commonwealth Trading Bank in Sydney and the learned trial judge rejected the tender because, at that time, the *Victorian Evidence Act* did not cover documents from outside the State of Victoria. As it happened the trial went on so long that the legislature was able to push through a quick amendment to the *Evidence Act* and subsequently when the documents were retendered by counsel they were admitted in evidence.

In the second part of the paper I have referred to special juries and some of the literature on the subject. You will appreciate of course that the special jury in England is not the sort of special jury I envisage. In England the special jury list was comprised of people with a certain social status or occupation or certain property rights. My proposal is something altogether different: a jury panel comprising people who by experience and training might be expected to be able to deal with factual situations such as will arise in difficult commercial cases.

The subject of special juries was dealt with by the Law Reform body in 1965[1]. The recommendation of the 1965 report on juries was that the ordinary juries could cope with most cases. The suggestion that there ought to be special juries was rejected, although I understand that "Justice"[2] recommended that special juries should be introduced in difficult cases of a commercial kind. More recently, Lord Cross, joint author of *The English Legal System*[3] said categorically that in difficult commercial litigation there is no room at all for juries. There should be a special tribunal. I have not been so bold as to suggest that we should do away with juries. Juries have served us extremely well and it would be very difficult, if not dangerous, to try and do away with juries in this particular area. I realise that this is a controversial subject. I would be very pleased if a compromise could be reached to introduce special juries to deal with difficult cases.

In reference to *voire dire* examinations before trial I said I regard such legislation as desirable because there is a significant number of cases in which the outcome of the *voire dire* examination necessarily results in the acquittal of the accused (p. 8). What I had in mind were those cases in which the whole of the case for the prosecution consists entirely, or almost entirely, of confessional material or of admissions. In my own experience in the last five or six years I think I have had three cases where the whole of the case turned upon whether the confessional evidence or evidence of admissions was admissible or not. In one particular case, it took half a day to empanel a jury and then after two days of argument the confessional material was rejected. It seemed to me to be an appalling waste of time for the judge to go through these procedures, and that it might be wise to introduce legislation to permit the hearing of such *voire dire* examinations before the jury is empanelled.

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1. The Report of the Departmental Committee on Jury Services. H.M.S.O. 2627 1965. *(The Morris Report).*

2. W. Cornish *The Jury* (Penquin 1968) at p. 199.

3. Radcliffe and Cross *The English Legal System* (1971) 5th Edition by Lord Cross of Chelsea and G. J. Hand (p. 421).

   See also: *Holdsworth History of English Law* Vol. 1 at p. 347.

COMMENTARY

The Honourable Mr Justice I. F. Sheppard
Supreme Court of New South Wales

Mr Ford's paper raises two main subjects for discussion, namely: the constitution of the tribunal and the processes or procedures which may be adopted to shorten time in court.

I am prepared to adopt the definition of white collar crime given by the Attorney-General and in one of the later papers, but for my part the difficulties arise in prosecutions for crime arising out of complex commercial frauds. I propose to limit my comments to the narrower field concerning cases of the kind exemplified by Mr Ford in his paper, cases which lasted for many days and in one instance involved some 3,000 exhibits, and similar cases which might not be as long nor as voluminous so far as documents are concerned. I would prefer therefore to use the expression 'corporate crime' rather than white collar crime.

I wish first of all to say something about the constitution of the tribunal. There are some who would think that a jury, special or otherwise, was unsuited to try this type of case. I agree with Mr Ford that one has to be a realist, and I do not see parliaments in this country abolishing juries in any case of serious crime. I do think, however, there may be room for a movement of the line across the board so that some offences (say under the *Companies Act*) may be the subject of summary trial rather than, as now, jury trial. One knows that under the *Bankruptcy Act* quite serious offences may be tried summarily by a judge although he may not impose as long a term of imprisonment as may be imposed by a judge where there has been a conviction by a jury.

When we consider trial of this type of case by a jury the question is how on earth do they do it? If a judge tried a case of that kind he would have a transcript at his elbow; it would be indexed and summarised; he would have ready access to and familiarity with exhibits; he knows, by his training, how to weigh and sift evidence; when the case is over he has had the assistance of addresses noted or taken down, and finally, he may reserve his judgment for days if not weeks. A jury has no access to transcript and cannot have such access for very obvious reasons (if it wants to be refreshed the transcript has to be read). It has the exhibits, or can have the exhibits in the jury room, but although it may look at them as the trial goes on, even after a witness has finished referring to them it has not ready access to them. It has no training and, when sent out, it must reach a decision within a few hours. That sort of procedure is acceptable and indeed beneficial in the more ordinary types of crime; murder, rape, armed robbery, etc. because the process by which a jury reaches its decision seems to me to be one under which it accepts or rejects the Crown case. However, you cannot approach this type of complex matter in that way. A judge might reject some and accept other parts of the case, but a jury, although it is told that it may do that, seems to me to operate by accepting or rejecting the case that is put forward.

As I say, I do not see juries being abolished in cases of major crime. I have a sympathy for Mr Ford's idea of special juries, but I doubt, with respect to Mr Ford, whether there are sufficient numbers of people of the kind he mentions in the community available to perform this service for the length of time that would be required. Before any lengthy trial, civil or criminal, in our courts the prospective jurors are told that the case will last two, three, four or more weeks, which enables them if they have commitments to apply to be excused. I think it is common experience that it is the man who is most able to help as a juror who applies to be excused; i.e. the business man, the professional man, the academic, who not only themselves are personally affected by lengthy cases but have other people dependant on them who are inconvenienced if they are absent for lengthy periods.

With very great respect to the Magisterial Bench, I wonder whether summary trial would not be more acceptable to the community if more summary jurisdiction were not vested in the Supreme and District Courts so that there was trial at least by a judge, as indeed there is under the *Bankruptcy Act.* This, I would suggest, could be combined with a full appeal as there now is from a single Supreme Court judge to the Court of Appeal in civil matters. That might, and again I emphasise that what I say is not intended at all as any reflection on members of the Magisterial Bench, have some effect on the psychology of the community about this problem.

In some Acts, including the *Bankruptcy Act,* a summary trial may result in a penalty which has to be shorter than the maximum that may be imposed if there is a trial and conviction by a jury. Whether this ought to be held out as an inducement to accept a summary trial is not a matter which I wish to discuss here (it was the subject of a recent debate in the New South Wales State Parliament). However, I would point out that it is to be found in other pieces of legislation as well as the *Bankruptcy Act,* and if it were introduced it might have the effect of causing people to submit to summary trial rather than jury trial.

In relation to procedures which may be taken to shorten time in court I was interested to read Mr Ford's remarks about the Commercial Causes jurisdiction (with which I have something to do), and to read the remarks of Mr Justice Eggleston in relation to pre-trial. The latter is something which under another name we are endeavouring to introduce into the civil jurisdiction of the Supreme Court. I was told informally by the Lord Chancellor, Lord Elwyn Jones, that pre-trial has come about at the Old Bailey and is now in an experimental stage with what result he was not able to tell me. But I would think, as indeed Mr Justice Eggleston suggests, that there is benefit, even if counsel's duty or object is so to complicate the case as to bring about the acquittal of his client by that tactic, that we ought to look at this type of case at an earlier stage than pre-trial. After all, this type of crime is investigated at a much earlier stage. In company situations one used to find out about it, if there were no police investigation, during the examinations which took place in our State before the Master in Equity under ss.249 and 250 of the *Companies Act* or their

predecessors. Those sections have largely been superseded by the provisions found in ss.173 and 174 of the *Companies Act* which are in Part VIA. I think it is entitled *Special Investigations* and, of course, the purpose of those provisions, which enable the examination of officers and others who know something about the affairs of the company which is in trouble, is to enable inspectors and others to find out the facts. No doubt that explains why you find in s.174(3) a provision which obliges a witness to answer questions even though they may tend to incriminate him but ensures that the answers, subject to his making the claim there referred to, cannot be used in any proceedings taken against him. That of course is contrary to provisions such as are to be found in s.69 of the *Bankruptcy Act* which provides for the public examination of a bankrupt. No doubt the two provisions are designed to achieve different ends but I do wonder whether we should not have a provision in our companies legislation which would enable inspectors or a judicial officer to examine the principal officers of a company publicly in the way that a bankrupt is publicly examined so that their answers would not only be given in public but would be usable, even though they might tend to incriminate them, in criminal proceedings against them. The provision has been in the *Bankruptcy Act* or its predecessor for fifty years. It does not seem to have excited much controversy and I do not remember any bankruptcy trial lasting very long. The explanation may be, of course, that business now is not done by individuals so much as by companies.

Other matters I wished to speak about, if time had permitted, concerned inquisitorial proceedings generally; averments such as we find in the *Customs Act;* and without trespassing on the ground of other speakers to later papers I had thought of mentioning an action for penalties which may overcome some of the Attorney-General's problems in relation to the unknown victim. For instance, if one provided for an action for penalties for insider trading, one might be able to create a fund which could be claimed against.

I will conclude by saying that it seems to me that if we are talking about white collar crime in the sense that I have used the term, and if we are talking about handling it in the future efficiently or reasonably well, the question *Can the Legal process handle it?* must be answered with a resounding NO unless something is done.

COMMENTARY

John Swan, LLM
Solicitor for the Corporate Affairs Commission,
New South Wales

Mr Ford has succinctly, but effectively, made two valuable recommendations limited in scope to indictable matters. Prior to proceeding with my commentary, perhaps I may be permitted to make some observations in relation to summary prosecutions in the first instance.

Summary Prosecutions

An examination of the Annual Reports of the Corporate Affairs Commission for the years 1971 to 1974 reveals that the preponderance of summary prosecutions relate to the failure by companies to lodge annual returns. The figures are as follows:

Year	*Completed*	*Pending*	*Total*
1971	453	85	538
1972	695	328	1,023
1973	2,544	1,426	3,970
1974	4,305	924	5,229

It is obvious from these figures that there is a continuing trend of default in this area, and we should ask ourselves whether we are achieving the desired results by issuing thousands of summonses every year. Clearly it is not the fine that the Commission is after but rather the Annual Returns. If we were merely engaged in an operation to replenish Consolidated Revenue, we could simply amend the Act to empower the Commission to impose and collect the fine itself (following the system of 'on the spot fines' for traffic offences). The object of the Commission is to ensure that the documents required by the Act to be lodged should be available for the inspection of the public as early as possible.

The Commission concedes that there is a reasonable response to the summonses, and many returns are in fact lodged with various explanations being given for non-lodgment. However, when we bear in mind that in 1975 summonses are being issued for failure to lodge 1973 returns, one cannot escape the conclusion that the Commission should take some other or further action to secure from the companies on its register the most recent information that could be made available for public inspection.

There is no easy solution. If the company is in default for two years, should the Commission hold itself satisfied that the company is not in operation and commence action under s.308 of the Act to strike the name of the company off the register? Or, should the inspectors of the Commission carry out inspections of the books of the company pursuant to

s.7(6) of the Act as soon as the default becomes apparent? Or, should the Commission apply to the Court under s.12(8) of the Act for an order directing an officer of the company to make good the default?

Whatever the alternative may bet is important that it should produce speedy results. If the directors were made personally liable for the fines with respect to all machinery provisions, I would anticipate a dramatic increase in lodgments of all documents. Such a fine need not carry the stigma of a conviction and may be imposed in a similar way to penalties under s.75B of the *Justices Act* 1902.

Special Juries

Returning to Mr Ford's paper, as my comments with respect to his second recommendation are brief, I shall deal with it first.

Mr Ford has recommended that the legislature accept in principle the concept of a special jury in complex fraud cases including company matters, to be selected according to experience and training in administration, business and commerce.

Whilst I am inclined to support this recommendation, I can foresee administrative problems in determining the methods of selecting such juries. For example, should the potential juryman have special academic qualifications to enable him to understand the accounting principles that have been adopted in preparing the accounts and group accounts of companies; should he have an understanding of the Ninth Schedule to the *Companies Act;* would directors, secretaries, stockbrokers or other professional people be disqualified from serving on such a special panel if the defendant himself falls within such a classification?

Pre-trial Hearing

There is a great deal of merit in Mr Ford's first recommendation that a hearing be held before a Judge before the trial with a view to clarifying evidentiary problems which would lead to facilitating the admissibility of documents and to examining witnesses on the *voir dire.*

Any suggestion leading to simplification of methods of proof generally deserves support. This support is of greater significance in company cases where documentary evidence is predominant.

Indictable crimes involving corporations are almost invariably commenced by the laying of an Information and the issue of a summons pursuant to the provisions of Division I of Part IV of the *Justices Act,* 1902. The committal proceedings are heard before a Magistrate. All evidence available to the Crown is put before the Magistrate and generally speaking the same rules of evidence apply as in a trial. The defendant by himself, solicitor or counsel, is entitled to cross-examine the Crown witnesses and

take whatever objection he sees fit. If the Magistrate finds that a *prima facie* case has been established against the defendant he commits him for trial; if not, he discharges him.

The whole evidence is again adduced at the trial and the same objections may be taken afresh by Counsel for the accused regardless of the rulings of the Magistrate. Indeed if the Crown intends to rely on additional evidence at the trial, the Crown must give the accused due notice of its nature (see *R. v Webb* [1960] Q.S.R. 443 at p. 447). Of course, it is settled that committal proceedings are not strictly judicial but rather administrative in nature, and that the decisions of magistrates are not binding on judges in any event. Be that as it may, the fact remains that the legislature has provided a system whereby the Crown case may be tested by the defendant so that he may become fully aware of the case he has to meet.

If Mr Ford's first recommendation is adopted additional proceedings are introduced between the committal stage and the trial. What we should aim at achieving is to bring the accused to a fair trial in the shortest possible time. Whilst there can hardly be any doubt that the preparation of the Crown case is an arduous task, it is important that such preparation should be dealt with expeditiously. The memory of the witness is often strained when he is required to give evidence in the form of 'I said ...' and 'he said ...', His memory will be even more strained when he is asked to recollect events which took place several years in the past. Many members of the public who were once anxious to assist become discouraged by legal formalities and unwilling to go to Court. At present a witness has to give evidence before two courts – what would his reaction be to being called before a third (intermediate) court to be examined on the *voire dire?* Indeed, as will appear from what follows, the same witness may have been required to give evidence in other jurisdictions and any further process of examination may prove to be quite intolerable.

Large company frauds are subjected to thorough investigation by inspectors of the Corporate Affairs Commission and where appropriate by inspectors appointed by the Attorney-General pursuant to the Special Investigation provisions of the *Companies Act* (Part VIA), if he is satisfied that it is in the public interest (s.170(1)). An appointed inspector has the power to require an officer of the company to appear before him for examination on oath, to produce books and other documents and to give all reasonable assistance in connection with the investigation (s.173(10). An 'officer' of a company is defined in very wide terms in s.168(1) of the Act and includes a person who is capable of giving information concerning the affairs of the company. An inspector may cause notes of an examination made by him to be recorded in writing and be read by the person examined and may require that person to sign the notes, and the signed notes (subject to certain exclusions) may be used in evidence in any legal proceedings against that person (s.176(1)). A person called for examination before the inspector is entitled to have his legal practitioner in attendance, who may, to the extent that the inspector permits, re-examine his client in

relation to the matters in respect of which the inspector has questioned him and may also address the inspector (s.174(2)). There is no limit on the number of occasions that an officer of a company may be required to appear before an inspector.

Although special investigations are not judicial proceedings such cases as *Maxwell* v *Department of Trade* (1974) 2 W.L.R. 338 and *Re Pergamon Press Ltd.* (1970) 3 W.L.R. 792 have clearly established that the principles of natural justice should be followed by inspectors in the course of their investigations. Inspectors are under a duty to act fairly. They can obtain information in any way they think best but before they condemn or criticise a man they must give him a fair opportunity for correcting or contradicting what had been said against him by other persons or in documents.

Where a company is in liquidation, any officer of the company or any person capable of giving information concerning the promotion, formation, trade, dealings, affairs or property of the company may also be ordered to attend before the Master in Equity for examination on oath pursuant to s.249 of the Act. Any such person may employ a solicitor (with or without counsel) who shall be at liberty to put to his client such questions as the Court deems just for the purpose of enabling him to explain or qualify any answers given by him. The examination of such a person is reduced to writing and he is required to sign same and any writing so signed may be used in evidence in any legal proceedings against him.

If an officer of a company thinks he can relax after going through the examinations before the Master and before the inspectors he is far from reality. Under s.367A of the Act, where it appears to the Commission that an officer or former officer of a company to which the section applies has conducted himself in such a way that the officer has rendered himself liable to action by the company in relation to the performance of his duties as an officer of the company, the Commission, or any person authorised by the Commission, may apply to the Court without notice to the officer or former officer for an order that he attend before the Court to be examined as to his conduct and dealings as an officer of the company.

And you may well ask: 'To which companies does this section apply?' The answer given by s.367C is that it applies to companies, *inter alia*, which are in the course of being wound up and companies under special investigation. By subsection (2) of s.367A the examination is conducted in the absence of the public unless the Court otherwise orders. The officer is examined on oath and is required to answer all questions which the Court allows to be put to him (with the usual reservation as to incriminating questions). The officer may be represented by a solicitor (with or without counsel) who shall have the liberty to put to his client questions for the purpose of enabling him to explain or qualify any answer given by him. Notes of the examination are reduced to writing, read out to and signed by the person examined and may thereafter be used in evidence in any legal proceedings against him.

The analogy between the examinations by the inspectors under the Special Investigation provisions and those before the Master under s.249 may be continued by saying that they are both conducted *in camera* and that transcripts and exhibits are jealously guarded by the inspectors and the officers of the court. It may be anticipated that when examinations under s.367A take place the same principle will apply. Whilst the provisions of the Act are clear that the signed transcripts are admissible in evidence in legal proceedings, an Order of the Supreme Court is necessary to transmit the deposition taken before the Master to the criminal courts; whilst a subpoena issued by persons other than the Crown for the transcripts of the evidence taken before the inspectors may be challenged on grounds of public policy. The Rules of Court allow a copy of the depositions before the Master to be made available to the Commission, but if it is desired to have an officer of the Commission in attendance at s.249 examinations, the Commission must apply to the Master for a special order for this purpose and it is necessary to show that a copy of the transcript of the witness will be insufficient in this regard.

I do not wish to canvass the reasons for secrecy attaching to examinations under ss.173, 249 or 367A, but when one bears in mind that the affairs of public companies are being investigated, that millions of dollars of public moneys may have been invested in such companies, that when in operation stringent requirements were in force with regard to material disclosures in published accounts, prospectuses or other documents, that when listed on the Stock Exchange such companies were required to keep the market informed of their activities and make all relevant disclosures for the information of the public, that questions are often asked in Parliament with regard to the affairs of such companies, it is apposite to say that the legal profession should take an inward look at its procedures and devise some reform aimed at simplification, co-ordination and whenever possible, disclosure.

Is it not appropriate, for example, to co-ordinate those provisions of the Act that confer powers of examination with a view to elucidating all relevant information from a witness before the one tribunal? Is there any good reason why examinations under ss.249 and 367A could not be combined where the company is in liquidation? Again, where s.249 examinations are being conducted should not the Commission have a statutory right of appearance so that its representative could put to the witnesses whatever questions are relevant to an investigation?

Supreme Court (Summary Jurisdiction) Act, 1967

As I stated previously Mr Ford's first recommendation deserves support, provided however, that we can achieve some simplification in our proceedings. This may be achieved by having recourse to the provisions of the *Supreme Court (Summary Jurisdictions) Act* of 1967 as amended by the Second Schedule to the *Supreme Court Act,* 1970. The former Act was proclaimed to commence on the 18th January, 1974 (see *Government Gazette* No. 6 of that date).

Section 3 of the *Supreme Court (Summary Jurisdictions) Act* provides:

> *(1) Where, under any Act, proceedings for an offence may be taken before the Court in its summary jurisdiction, the Court shall have jurisdiction to hear and determine those proceedings in a summary manner.*
>
> *(2) The summary jurisdiction conferred on the Court by subsection one of this section shall be exercised by a Judge sitting alone, and not otherwise.*

It may be said immediately that this Act does not confer power on the Supreme Court or a Judge thereof, to hear indictable matters. This is true, but what we should reflect upon is whether the indictable offences created by the *Companies Act* and the *Securities Industry Act* should retain their indictable character or be reclassified as summary offences. Indeed, in some of the other States of the Commonwealth there are very few offences created by the *Companies Acts* which are stated to be indictable.

We must remember that several of the indictable offences under the *Companies Act* overlap with the crimes dealt with by the *Crimes Act.* For example, an untrue statement or wilful non-disclosure in a prospectus attracts the prohibitions contained in s.47 of the *Companies Act* as well as s.176 of the *Crimes Act;* likewise, the offences referred to in s.375A of the *Companies Act.* Again, the offence created by subsection (2) of s.374F of the *Companies Act,* is very similar to that in s.175 of the *Crimes Act.* The offence of 'carrying on business of the company with intent to defraud' in s.374C(2) could well be the subject of a prosecution for conspiracy. The similarity ceases when the penalty is considered. It is very severe under the *Crimes Act,* up to ten years penal servitude, whereas the maximum is two years for *Companies Act* offences with an alternative or additional fine up to $5,000.

Whilst there may be scope for retaining the indictable crimes contained in the *Crimes Act,* it is my submission that there is a real need to convert the indictable offences created by the *Companies Act* and the *Securities Industry Act* to summary offences and conferring upon the Supreme Court the jurisdiction to hear the resultant prosecution pursuant to the *Supreme Court (Summary Jurisdictions) Act.* There is also a need to raise the maximum penalty which may be imposed by a Judge of the Supreme Court when hearing such a prosecution, and to provide for a bar to further criminal prosecution in relation to the same acts or omissions.

Civil Proceedings

Further simplification and co-ordination could be achieved by conferring on the Supreme Court hearing the summary prosecutions the power to make orders for restitution and for payment of damages at the conclusion of the trial. The power to order the payment of compensation

to an aggrieved person is already vested in criminal courts (albeit to a limited degree) pursuant to ss.437 and 554 of the *Crimes Act*, provided however that a conviction has resulted from the prosecution. Other provisions enable the criminal courts to make orders for restitution of property.

At present the Commission (or a prescribed person) has power pursuant to s.367B of the *Companies Act* to apply to the Court for an order that a person who has taken part in the formation, promotion, administration, management or winding up of a company to which the section applies, to repay or restore the money or property of the company (together with interest) or pay to the company a sum by way of damages if it can be shown to the satisfaction of the Court that he has misapplied the money or property of the company or has been guilty of negligence, default, breach of duty or breach of trust in relation to the company. The section applies to companies, *inter alia*, that are in the course of being wound up or the affairs of which are being investigated pursuant to Part VIA of the Act.

Some of the acts or omissions referred to in s.367B give rise to criminal prosecutions and the general principle applies that an action for damages based upon a felonious act on the part of the defendant should not be pursued so long as the defendant has not been prosecuted or a reasonable excuse shown for not prosecuting him (see *Archbold Criminal Pleading*, 35th Ed., paras. 834–5; the 38th Ed. of *Archbold Criminal Pleading* no longer refers to this principle).

This rule has been criticised recently by the Court of Appeal in *Rochford* v *John Fairfax Limited* (1972) 1 N.S.W.L.R. 16, where Sugerman A.C.J. said at p. 20:

> *That rule, artificial (because confined to felonies), and now largely unnecessary because of contemporary methods of law enforcement (indeed already abrogated by statute in England), is not, with respect, founded on any idea of a principle of public policy operating against the trial of a civil issue before the trial of a criminal issue touching upon the same subject matter. Its explanation is that in a period when the initiation of a prosecution for felony lay largely in the hands of private individuals, the rule was intended both to encourage the injured person to prosecute, by withholding from him the fruits of a civil verdict until he did, and to discourage him from employing the compromise of a civil action brought against an offender as a mode of compounding a felony.*

This criticism is of special significance in corporate crime as the costs of defending criminal prosecutions are only too apparent. It is my submission that public justice would be better satisfied if criminal and civil trials in corporate matters were combined.

Some sections of the *Companies* and the *Securities Industry Acts* expressly provide that certain persons may become personally liable after conviction, see for example ss.124(3) and 374D of the *Companies Act* and s.75 of the *Securities Industry Act.*

It would be helpful if the offences created by the *Companies* and *Securities Industry Acts* were redrafted to conform with s.75A of the *Securities Industry Act.* Subsection one of that section creates the offence of 'insider trading' in securities. Whether or not any person has been prosecuted for or convicted of that offence, where an advantage is gained from dealing in securities to which the offence relates, any person who gained that advantage is liable to another person for the amount of any loss incurred by that other person by reason of the gaining of that advantage, or liable to the corporation or body that issued the securities for any profit that accrued to him by reason of the gaining of that advantage (s.75A(2)). By virtue of subsection four of this section, the Commission may, if it considers it to be in the public interest to do so, bring an action in the name of and for the benefit of a corporation or other body or person for recovery of a loss or profit referred to in subsection two of this section.

Members of the public are vociferous in their complaints when they have lost their investments, and the prosecution of the officers of the company is not a financial solace to them. Not many of them are in a position to take recovery action on their own account and it is for this reason that specific provisions were inserted into the *Companies Act* and the *Securities Industry Act* enabling the Commission to institute such proceedings. I remember a lady ringing me some short time before Christmas last year to ask me what the Commission had done about her mother's investment in International Vending Machines. I informed the lady that the officers of the company had been successfully prosecuted and sentenced some years ago. The lady immediately asked: 'When do we get the money?'

It is therefore my submission that the public interest would be best served by conferring on the Commission the power to take civil action in all cases; for 'what does it profit a creditor of a company if all its directors were prosecuted but he lost his life savings?'

DISCUSSION

His Honour Judge R. F. Loveday, Q.C.,
Judge of the District Court of
New South Wales
Member of the Law Reform Commission
of New South Wales

I would like to congratulate the speaker and then suggest for constructive criticism a pattern for a complex criminal trial. I would suggest as an initial proposal that there should be no committal proceedings at all before a magistrate. The decision to prosecute should be the responsibility of a Director of Prosecutions or some other independent official who would make his decision on the material supplied to him by police, investigating officers from the Companies Branch and so on.

On or before his *first appearance* before a judge the accused should be presented with a discovery statement which would contain all the material which would be presented to the court in the event of his pleading guilty. On his first appearance in court the accused would be formally charged before a judge, the appearance of legal representatives noted, any question of legal aid dealt with, if the accused wished to plead guilty this would be accepted but no plea would otherwise be sought, arrangements would be made for full discovery by the Crown to the accused's legal representative and bail would be granted or refused or remand date arranged. During the period of remand, discovery would be made by the Crown of documents intended to be tendered, statements of witnesses whose evidence is to be relied on, preferably sworn, and finally, statements of witnesses whose evidence is not intended to be relied on but whom the accused may require.

On his *second appearance* in court a plea would be taken, a summary of the Crown case tendered, any documents relied on by the Crown would be tendered, any questions of admissibility being argued and decided, statements of witnesses intended to be relied on by the Crown would be tendered (again any questions of admissibility being argued). The accused would have the right to require any or all of these witnesses to be present at the trial for cross-examination. If he made no such requirement then the statement would itself be evidence. Any admissions made by the accused would be noted and these admissions, of course, might avoid the need for some statement or documents. The accused would have the right to tender documents and statements. The mode of trial would be decided and the accused would have the right to elect to be tried either by judge alone or by judge and assessors or by judge and jury. If he elected a judge and jury then the judge would decide whether it should be an ordinary or special jury.

Assuming that a special jury were decided upon, the *third appearance* would be for the purpose of selecting the special jury who would then be given copies of all material tendered by the Crown, and the accused and

the court would adjourn to enable the jury to study the documents. That would necessarily be a very short adjournment, as short as possible, because bail would ordinarily not be granted during this period for obvious reasons.

At the trial the only witnesses who would be called would be those whom the accused or the Crown wished to cross-examine or whom the judge or the jury wished to have called. The jury would be supplied with copies of the transcript of evidence as the trial proceeded, counsel for the Crown and the accused would each have the right to tender a summary of their respective cases at the conclusion of the evidence. Finally, a majority jury verdict comprising at least three quarters would be acceptable but only after the jury had failed for four hours to reach an unanimous verdict.

I apologise for the summary manner in which these have been presented. May I say that these are not the views of the Law Reform Commission nor indeed my concluded views. They are put in this summary form merely in the hope that they will stimulate some criticism.

THE PSYCHOLOGY OF THE CORPORATE CRIMINAL

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This is not really a paper on the 'psychology' of the corporate criminal. It is, rather, an attempt to give a profile of certain people, convicted of crimes generally thought of as 'occupational' or 'white collar', based on their socially relevant attributes. These attributes include such things as age, occupation, educational level, marital status and previous court history. They do not constitute a basis for hypotheses on psychological factors, such as the individual's motivation for crime, although they may give some inkling as to his reaction to the judicial and punitive processes. I have, therefore, kept such conjecture to a minimum, preferring to adhere to what I conceived to be the original purpose of the paper. This was to compare the social background of 'white collar' with other offenders, with a particular view to its relevance to sentencing.

The term 'corporate crime' is a fairly broad one. It embraces both criminal activity by or on behalf of corporations and also crimes committed against them. It can be applied to crimes ranging from the commission of environmental offences, to embezzlement, through to the issuing of false prospectuses. The people I have chosen as white collar or corporate criminals for this study have been selected for a variety of reasons. One of the main ones was the accessibility of data. In the short time available to prepare this study, it would have been impossible to gather together all the evidence available from such disparate sources as Courts of Petty Sessions, Higher Criminal Courts, and the Corporate Affairs Commission records, and analyse it. I have had to restrict my sources. It was also desirable that people should be chosen who were guilty of relatively serious crimes. For both these reasons, I have drawn from the records of the N.S.W. Higher Criminal Courts for 1973. These records were gathered by the Australian Bureau of Census and Statistics, and have been made available to the New South Wales Bureau of Crime Statistics.

For the purpose of this paper any person who has been convicted for a crime which:

- is against property,
- involves fraud or deception,
- does not involve violence,
- arises from some corporate or business activity,

is considered to be a white collar criminal.

The Offences

There are four classes of offence which satisfy all these conditions:

Embezzlement (including larceny by clerk or servant) – 84 cases.

Fraudulent Misappropriation (including omit to account) – 23 cases.

False Pretences (including credit by fraud, conspiracy to defraud, making false statement; all offences arising from issue of a false prospectus) –131 cases

Valueless cheques – 5 cases.

We are interested in these offences from the point of view of sentencing. Therefore, persons who appeared but were not convicted are excluded. For the same reason the study is based on offenders rather than offences. If the same person appears twice for a similar offence, he will be considered as one unit for analysis.

A wide variety of crimes are included in these categories. Many of them cannot be described as 'corporate'. This word suggests that someone has used a company to commit a crime. But some of our offenders have stolen from companies rather than using them as an apparatus to steal from others. For the remainder of this discussion, therefore, I shall use the broader terms 'white collar' or, 'occupational' to designate the group we are interested in.

Methodology

The backgrounds of people convicted in 1973 for the above offences are compared with those of all others convicted in the same courts in the same year. This latter group includes people convicted for offences against the person, other offences against property, offences against good order, traffic offences, etc. By taking the white collar criminal as one class, and comparing him with all others considered as one group, we run certain risks.

Suppose we discover that the white collar group has certain features which differentiate it significantly from the others. Are we justified in concluding that these characteristics are peculiar only to occupational criminals? It may well be that other subgroups of offenders possess these same characteristics but that they were 'swamped' by being placed among more numerous cases which are completely different. Yet such offenders, if they existed, would be of crucial importance in a discussion of sentencing rationale.

There seems to be no way of conclusively proving that the attributes which stand out for white collar offenders, as opposed to other offenders, are unique to them as a group.

What I have done is to extract two other sub-groups of offenders. The first comprises those who have been convicted of break, enter, and steal offences, and the few who have been 'found at night with intention to commit a felony'. These two offences are the main ones which are both 'violent' and 'against property'. The second group includes all those who have committed 'non-violent' crimes against property, other than those who fall within the white collar group. Such offences include larceny of a vehicle, receiving, unlawful possession of property, and forgery.

In referring to breaking, entering and related offences as 'violent' crimes against property, whereas larceny of a motor vehicle, receiving, etc. are described as 'non-violent' I am following the British system of legal classification. I realise that characterizations such as this are rather artificial. Nevertheless there is an important distinction made here which is useful for this study. The violent offences which I have selected all involve the infliction of force and the damaging of property. They can also involve an element of danger if the intruder is disturbed or cornered. They have an aura of 'action' or 'aggression' on behalf of the offender. This is lacking in 'non-violent' crimes, where the possibility of the offender being in direct contact with the victim is remote.

From the point of view of sentencing, both categories are ideally suited to contrast with 'white collar'. Neither contains the added element of an offence committed against the person. On the other hand, there seems to be a different 'type' of offender involved in each case and it is important to see whether this is reflected in the background factors we consider.

In a supplement to the main discussion, I will further compare the white collar group with these two categories of offenders. If we discover that the characteristics which distinguished the occupational group also strongly differentiate them from these offenders, then we have stronger justification in assuming that such characteristics are unique to white collar criminals. If, on the other hand, we find that one or other group shares the characteristics of occupational criminals this in itself opens up interesting questions on sentencing.

Background Characteristics: Corporate versus other Offenders

Age at time of arrest

It is common knowledge that two out of every three offenders convicted in courts in New South Wales are aged under twenty-four. When we look at those convicted for offences other than white collar, we find that they conform to this pattern.

With the white collar group, on the other hand, there is a significant contrast. Less than one in three was under twenty-four, and less than one in twelve was under twenty.

Table A

*Age at time of arrest**

	white collar		*other*	
	no.	per cent	no.	per cent
under 20	18	7.6	1,164	30.3
20 – 24	58	24.2	1,281	33.4
25 – 29	60	24.9	555	14.5
30 – 39	59	24.6	486	12.6
40+	45	18.7	354	9.2
not stated	3		5	

* Due to technical problems, 20 cases heard in Higher Criminal Courts of N.S.W. during 1973 have had to be excluded from subsequent tables in this study.

Sex

An interesting characteristic of the white collar group was the relatively high proportion of women convicted. Just under one in seven (N=33) white collar offenders was a woman, compared with one in thirty among the remainder of offenders.

Country of birth

There was a slight tendency for more white collar criminals to have been born overseas. Just over seven out of ten white collar offenders were born in Australia, compared with more than eight out of ten other offenders. England contributed more than nine per cent of white collar criminals, compared with 2.5 per cent of other offenders.

It is interesting to note the census data for New South Wales of 1971. This gives the proportion of those born overseas as 12.4 per cent.

Educational level

Each person who appeared before a Higher Criminal Court was classified according to his or her level of educational achievement. There were five categories: those who had attained the higher school certificate or equivalent, those who had gained the school certificate, those who had attended secondary school but reached neither school certificate nor intermediate level, those who had attended primary school only, and those who had never attended school.

White collar criminals proved to be more highly educated than other offenders. The majority, 54 per cent had attained higher school or school certificate qualifications. This contrasted with less than one in three of the control group.

For offenders other than white collar ones, the general rule was to have attended secondary school but not to have attained intermediate or school certificate status. Two out of every three were at this level. By contrast, only four out of ten white collar criminals were in this category.

Table B

Educational background

	white collar		*other*	
	no.	per cent	no.	per cent
higher school certificate	32	14.0	188	5.0
school certificate	92	40.0	858	28.2
secondary	98	42.6	2,411	65.1
primary	8	3.4	244	6.6
none	—	—	5	0.1
not known	13		124	

Marital status

The difference which we noted in the age distributions of the two groups is supported when we consider marital status.

The majority (six out of ten) of the white collar group were married or living in a *de facto* relationship. Only one in four non white collar criminals was in the same category. Other classifications: single, separated, widowed, divorced, accounted for almost four in ten of the white collar group; seventy-four per cent of the other offenders fell into these categories.

The older an individual is, the more his marital status can be seen as an indicator of his integration into the social fabric. Once ties with parents, siblings, etc. have been loosened, compensatory ties have to be established. For many these new primary attachments are formed through marriage.

Both groups were broken up according to age, and corresponding age-groups contrasted on marital status. Not surprisingly, almost all offenders aged under twenty, whether white collar or not, were single. However, for those over twenty, there was a noticeable disparity. In each of these age groups a much higher proportion of white collar criminals than other offenders were married.

Table C

Age by marital status

	white collar				other			
	married*		not married**		married		not married	
	no.	per cent	no.	per cent	no.	per cent	no.	per cent
under 20	2	11.1	16	88.9	47	4.1	1,111	95.9
20 – 24	26	44.8	32	55.2	313	24.5	966	75.5
25 – 29	42	70.0	18	30.0	256	46.4	296	53.6
30 – 39	45	76.3	14	23.7	263	54.6	219	45.4
40+	31	68.9	14	31.1	190	53.7	164	46.3

age or marital status not known = 3

* Including *de facto*.
** Includes single, divorced, separated, widowed.

Previous convictions

Another factor which strongly differentiates the white collar group's profile is previous conviction.

For 55 per cent of white collar criminals found guilty in 1973, it was their first conviction. This was true for only one in five of other offenders. The factor which was most important in boosting the non white collar group's previous conviction rate was the Children's Court. Very few (less than one per cent) of the white collar group had a previous record which was confined to the Children's Court.

By contrast almost one in ten of the non white collar group had such a record. The rates for convictions in Children's Courts combined with Higher Courts and/or Courts of Petty Sessions showed a similar imbalance.

The fact that white collar criminals had a much lower incidence of appearance at Children's Courts can be interpreted in a number of ways. As a child, the white collar offender would have had limited opportunities for the criminal behaviour for which he has been convicted as an adult. This is not true of other crimes, such as car stealing, breaking and entering, etc. In addition, convictions at a Children's Court, and the subsequent disruption to childhood and juvenile development, would inhibit an individual's chances of later being placed in a position of trust in a skilled or semiskilled post. Yet these are the main circumstances that offer opportunities for occupational crime.

Table D

Previous convictions

	white collar		*other*	
	no.	*per cent*	*no.*	*per cent*
none	135	55.7	995	26.0
children's court only	2	0.9	367	9.6
petty sessions	47	19.3	708	18.5
higher court	4	1.7	51	1.4
children's court & higher	—	—	73	1.9
children's court & petty sessions	22	9.1	582	15.3
higher court & petty sessions	21	8.7	391	10.3
children's courts, higher and petty sessions	11	4.6	651	17.0
	242	100.0	3,818	100.0
unknown	1		12	

Previous juvenile convictions

What we have seen so far shows that the childhood conviction pattern in the white collar group differs from that of the rest of the sample population.

A similar picture is maintained for the juvenile histories. Fewer than one in four (N=35) of the white collar group had been dealt with by the courts as a juvenile. Less than one in twenty (N=10) had been institutionalised; and only eight per cent (N=20) had been placed on probation.

Those with convictions for crimes other than white collar differ markedly. Just under forty four per cent (N=2673) had been dealt with by the courts as juveniles. One in nine (N=419) had been committed to an institution. More than one in seven (N=580) had been placed on probation or bond, and over thirteen per cent (N=506) had been both institutionalised and placed on probation.

For a large portion of those convicted by Higher Criminal Courts in 1973 a pattern of childhood and juvenile delinquency had already been established. This pattern is absent for white collar offenders.

Previous convictions for similar offence

When someone appears before a Higher Criminal Court, it is recorded whether he has previously been convicted of a similar offence.

The Bureau has not been able to satisfy itself that those compiling the data had provided themselves with adequate criteria for deciding whether crimes were similar or dissimilar. The absence of such guidelines means that in many cases this variable may record little more than an opinion.

Nonetheless, it is interesting to compare this aspect of the two groups. Those who had already commited a 'similar' offence constituted less than one in six (N=39) of the white collar criminals, compared with more than three out of ten (N=1191) of the remainder of offenders.

Other previous criminal history

Whether the offender has been placed on a bond within five years of the offence's commission, or whether he has ever been imprisoned, are other factors which play an important part in the sentencing process. There is a strong conformity in these aspects of criminal history with the trend we discovered for previous 'similar' offence.

Table E

other previous criminal history

	white collar per cent	*other* per cent
previously convicted for 'similar' offence	16.0	31.0
previously imprisoned	14.0	34.0
previously placed on bond*	16.0	37.0

* From Children's Court, Court of Petty Sessions, Higher Court, or combination of foregoing courts.

Recent Criminal History

Other aspects of the defendant's background which are recorded in the Higher Criminal Court statistics concern his more recent court history. Was the defendant on a bond at the time the offence was committed? Had he been placed on probation within the four years prior to the present offence? Was he under supervision at the time?

In about nine out of ten cases the answer for white collar and non white collar offenders alike was 'No'. There was a tendency for the non white collar group to have more cases of bond, probation or supervision in recent history, but in view of the overwhelming proportion of negative answers for both groups the variations are not to be viewed as significant.

Occupation

Before we investigate the occupational characteristics of our sample of offenders, it is necessary to sound a cautionary note. Some people may downgrade their occupation in an attempt to avoid being publicly identified. This may produce an overemphasis in the unskilled categories of occupation.

The study was somewhat hampered by the way the Bureau of Census and Statistics codes occupations. Sometimes they subsume positions which differ widely in terms of social status under the same code number. For example, 'butchers (so described)' are classified together with 'abattoir workers', on the grounds that both work with meat. This makes the grading of occupations according to status, very important from the social point of view, extremely difficult at times. Therefore, the results of such a grading should be viewed with some caution. Nonetheless the occupational codes were sufficiently specific in enough cases to make recasting of the data, in this more meaningful way, possible.

There was a marked dissimilarity in the occupations of the white collar group and the remaining offenders. More than one in five white collar criminals was in an occupation classified as 'clerical'; a further one in twenty was 'executive managerial'; sixteen per cent were in occupations that

can be broadly classified as 'sales'. The remainder, almost sixty per cent, of the white collar group was more or less evenly distributed. Labourers accounted for just over one in eleven, unemployed for four per cent. In contrast forty five per cent of those convicted for crimes other than white collar were labourers. A further one in twenty was unemployed. Professional, executive managerial, clerical and sales workers, who accounted for more than two out of five of the white collar group, made up less than one in fourteen of the other offenders.

Members of both groups were ranked on the status accorded their position by the Australian public*. Many sociological studies have shown that this is an effective indicator of variations in lifestyle and opportunity.

To effect this ranking, a member was placed into one of four categories according to his occupation. These groups are: 'A', which corresponds to professional and managerial categories; 'B' semiprofessional and other managerial; 'C', sales, small business, clerical, trades, semiskilled; and 'D', unskilled. There were also a few residual categories, such as unemployed, students, etc.

During January – March 1973, the Bureau of Crime Statistics and Research analysed the occupations found in a random sample of the population of Sydney. This exercise was repeated, on a smaller scale, in 1974.** I have used these two analyses to arrive at the proportions of the general population expected to fall within each of the employment categories. These figures are incorporated in the table below.

Table F

Occupational status

status	*white collar*		*other*		*general population*
	no.	per cent	*no.*	per cent	per cent
'A'	3	1.3	4	0.1	3.8
'B'	23	10.2	81	2.3	19.2
'C'	134	59.9	959	27.5	56.6
'D'	64	28.6	2,457	70.1	20.4

	white collar	*other*
unemployed	10	221
housewife	7	27
pensioner	1	71
retired	1	–
gaol	–	10

* The basis was A. A. Congalton: *Status and Prestige in Australia.* Melbourne, Cheshire (1969) pp.138–142.

** N.S.W. Bureau of Crime Statistics and Research, Report No. 17, *Crime Correction and the Public* (Sydney, 1974).

The reclassification of occupations according to social status reveals that white collar criminals are almost unique. Alone among offenders this group's status distribution comes close to reflecting the general profile of the community. Admittedly unskilled workers are over-represented, but not nearly to the extent that we see for the remainder of offenders. Yet it is this latter group which conforms to the pattern we have come to expect from previous research.*

For the first time people in sales, small business, clerical, trades or semiskilled occupations appear in almost the same proportions among offenders as they do in the general population: similarly for the semiprofessional groups. The professional and managerial categories are still well under-represented, but not nearly to the extent usual in studies of this sort. The high proportion of 'semiskilled' or 'trade' workers in the white collar group reminds us of the nature of the offenders we are dealing with. They are not 'corporate criminals' in the sense that they use public or private corporations to defraud the public. They are mainly people who have stolen from their employers, or have obtained credit from companies by fraud.

It is interesting to note that almost eighty per cent of the white collar group fell into the 'A' 'B' or 'C' categories. This means they had acquired some skills for their occupations. By contrast, less than thirty per cent of other offenders were skilled or semiskilled. This has interesting implications for sentencing, especially from the point of view of rehabilitation.

Comparison of white collar offenders with non-violent property and break, enter and steal offenders

In the introduction to this study, I observed that any hypotheses which emerged from comparing white collar with the total group of all other offenders would have to be further tested. Such tests should take the form of a comparison of white collar convictions with appropriate subgroups, chosen on the basis of comparability of offence.

Two such groups were chosen. The first consisted of other 'non-violent' property offenders,** the second of those convicted of 'violent' property offences, the main one being breaking, entering and stealing.

The characteristics which have emerged as most distinctive of white collar offenders are age, sex, educational achievement, marital status, occupation and previous court convictions. Therefore, tables showing the distribution of these characteristics were extracted for both 'non-violent' and 'violent' property offenders. These tables are included in the Appendix. (p. 45)

* See N.S.W. Bureau of Crime Statistics and Research: *Petty Sessions Statistics 1972; Drug Offences 1972; Breathalyser Offences 1973; Drug Offences 1973.*

** The main offences in this category are larceny of a vehicle, receiving, unlawful possession of property, forgery.

On every characteristic, both types of offender stood out in contrast with the white collar group. Their members were younger than white collar ones, and both groups had a lower proportion of women. Few in either group had the educational achievements we saw for many of the white collar offenders. In a similar way, marital status and occupations were differently distributed. Both groups showed a higher degree of previous court convictions.

A profile has emerged for the white collar, as opposed to other offenders in Higher Criminal courts. He is usually older, in his thirties or forties. He has a higher level of education. His occupational status is higher than that of other convicted criminals. Unlike most criminals he has had little previous experience of the criminal justice system, either as child, juvenile or adult. In particular there is not the evidence of an early involvement with the children's court which characterises the recidivist criminal.

Implications for Sentencing

The unusual characteristics of the white collar group make it particularly interesting for sentencers. As a conclusion I will breifly discuss some of these implications.

My method will be to put forward arguments based on two distinct, and sometimes conflicting, approaches to sentencing. The first is an 'individualised' one. It places heavy emphasis on the effect the sentence will have on the individual offender. It tends to ignore wider concepts of social justice. The second approach is much more broadly based. It also is concerned with the effect on the offender, but it strongly emphasises the social implications of the sentence.

Individualised Approach

If we accept that there are three main principles in sentencing: rehabilitation, retribution and deterrence, then arguments may be advanced on all three grounds for a more lenient attitude in the punishment of the white collar offender.

To illustrate, though at the risk of grossly over-simplifying, I will construct an hypothetical case. Consider two convicted offenders. One has broken into houses, which he knew to be unoccupied, and stolen property valued at $2,000; another has embezzled the same amount. In all likelihood, previous convictions, and in particular previous convictions for the same sort of crime, will be much lower for the embezzler. It is much more likely that there will be an element of recidivism with the offender convicted of break, enter and steal. The white collar criminal probably has higher educational and vocational skills. This means that, theoretically at least, he is better equipped to find employment. In practice, though, he may find that

knowledge by potential employers of the nature of his crime effectively bars him. Another factor that could make his reintegration into society more difficult is his age. More white collar offenders were older than other criminals, and may find it difficult to secure employment in society which discriminates in favour of the young.

From the point of view of rehabilitation there could be advantages in giving the white collar criminal a lighter sentence. He is not likely to repeat his offence, and is well integrated into society. Gaol can offer him little in social or technical skills. Perhaps the best way to rehabilitate him is to allow him to rejoin society and live down his crime as quickly as possible. The evidence we have seen on the age, marital standing, social status, and educational achievements of the white collar criminal all tend to suggest that he is more likely to identify with the existing social mores. In addition, stigmatization as a lawbreaker is more likely to be a new experience. Both these factors suggest that for the occupational criminal the trauma of arrest, trial and passage through the corrective processes, would be much greater. We might expect that he would suffer more, at least in terms of social dislocation and loss of status, from the same sentence than would his non white collar counterpart.

If it is the aim of retribution to exact suffering for the suffering the offender has caused others, then on this ground also it could be argued that there is justification for giving the white collar criminal a 'lighter' sentence. Fewer occupational offenders repeat their crimes. This suggests that it may be the very process of identification of the individual as a criminal, rather than any punishment imposed, which deters the white collar criminal. Therefore, deterrence, also, may seem to require a less severe sentence from the white collar offender.

Counter View

There is a counter argument to these views, however, which bases itself on a much broader outlook on the institutions of society; the power relations between these institutions, the judicial system insofar as it tends to support them, and these statistics insofar as they are a product of the judicial facts. It has been argued that white collar crime, including the offences that we have discussed in this paper, is by far more damaging in economic terms, than any other form of criminal deviance.*

We may have shown that a lighter sentence is justified on the grounds of specific deterrence (that is, in preventing an individual from repeating his offence). However, in view of the widespread and damaging nature of the phenomenon, what is needed is greater general deterrence. That is, there is a need to provide penalties that prevent people from committing white

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* See, for example, Sutherland & Cressey, *Principles of Criminology* (J. B. Lippincott Co. 1960) pp. 40–47.

collar crimes in the first place. Nothing we have adduced in the previous pages can lead us to think that there is any justification for lighter penalties on this basis.

The facts we have brought to light in this paper support the view that white collar crimes are committed by people closer to the sources of power in society than other criminals. Edwin H. Sutherland *(White Collar Crime,* N.Y. Dryden, 1949) has argued that the status of the offender has a great deal to do with the existence of any organised antagonism towards his offences on the part of the public. Certain acts, which higher status persons or groups continuously perform, may have an equally deleterious effect on others, but they may be much more widely tolerated, to the extent that they are rarely prosecuted. In fact some of them may never be defined as crimes at all.

According to this view, the fact that our white collar criminals have much lighter 'records' than their other criminal counterparts may be due not to the fact that they have never deviated from the laws, but to the fact that they have never been as rigorously investigated. They have quite possibly been operating in a 'grey' area of law where it is impossible to prosecute, and, when finally taken to court, they have been able to advance a more sophisticated defence.

To impose lighter sentences on such people may be to exacerbate an existing injustice, which discriminates against the socially isolated, and sees their transgressions as against society's interest, whereas equally serious white collar crimes are ignored. Although the characteristics of the individual offender are important, it is incumbent upon the sentencer to be aware of social considerations, and to strive to administer social, as well as individual justice.

APPENDIX

'Violent' and 'Non-Violent' Property Offenders

Age at time of Arrest		*'violent' property*		*'non-violent' property*	
		no.	per cent	no.	per cent
under	20	394	32.8	374	35.1
	20 - 24	407	33.8	330	30.9
	25 - 29	188	15.6	154	14.3
	30 - 39	139	11.5	123	11.5
	40+	75	1.3	86	8.2
	Total	1203	100.0	1067	100.0
	not known	1		1	

Marital Status		*'violent' property*				*'non-violent' property*			
		married		not married		married		not married	
		no.	per cent	no.	per cent	no.	per cent	no.	per cent
under	20	11	2.9	362	97.1	9	2.5	358	97.5
	20 - 24	108	25.4	317	74.6	74	22.0	262	78.0
	25 - 29	79	41.6	111	58.4	70	45.8	83	54.2
	30 - 39	68	49.6	69	50.4	75	58.1	54	41.9
	40+	27	35.1	50	64.9	37	45.7	44	54.3
	Total	293		909		265		801	
	not known	2				2			

Occupational Status	*'violent' property*		*'non-violent' property*	
	no.	per cent	no.	per cent
Congalton 'A'	1	0.0	1	0.1
Congalton 'B'	7	0.6	24	2.5
Congalton 'C'	251	23.0	300	30.6
Congalton 'D'	836	76.4	655	66.8
Total	1095	100.0	980	100.0
unemployed	88		60	
housewife	4		6	
gaol	3		3	
pensioner	14		19	

Sex	*'violent' property*		*'non-violent' property*	
	no.	per cent	no.	per cent
male	1175	97.6	1019	95.4
female	29	2.4	49	4.5
Total	1204	100.0	1068	100.0

Education	*'violent' property*		*'non-violent' property*	
	'no.	per cent	no.	per cent
higher school	44	4.4	59	5.8
school certificate	231	19.9	282	26.8
secondary	818	68.6	649	61.2
primary	77	7.1	56	5.6
none	—	—	3	0.6
Total	1170	100.0	1049	100.0
non known	34		19	

PRESENTATION OF PAPER

A. Sutton

My paper is a descriptive paper. It was not intended to discover which characteristics cause people to commit white collar crime, but simply to state the characteristics of convicted white collar criminals. Nor does it attempt to say which characteristics are the most important. The main characteristics that I choose are social characteristics; age, marital status, occupation – things that can be discovered from the court record of the criminal. The paper is based on the 1973 Higher Criminal Court statistics and the actual crimes that form the basis of the study are embezzlement, fraudulent misappropriation, false pretences and passing valueless cheques.

In the few minutes that are available I will talk a little about the terms corporate crime and white collar crime, and try to make clear the way that I use them in the paper, because unless that is clear many points I make will be lost.

In 1939 in his Address to the American Sociological Society the term white 'collar crime was used by Sutherland* to refer to 'the violation of legal codes in the course of occupational activity by persons who were respectable and of high social status'. On the basis of this definition a group of offences was arrived at which were called white collar crimes. However, criminologists soon realised that the crimes thus isolated were very often being committed by people who certainly did not satisfy the criteria of high status and were not quite as respectable as Sutherland originally had in mind. For example, Newman** in his study on white collar crime suggests that farmers, repairmen and others in essentially non white collar occupations could, by virtue of such things as watering milk, making illusory repairs to T.V. sets and so on, be classed as white collar violators even though they were not white collar workers. Similar results came from Clinard's*** study of black market violation.

Consequently it was suggested that the concept of white collar crime should be expanded to include all violations of the law which occur in the course of occupational activity. It is this concept of white collar crime that I used as a basis for the study. I think that in many ways the term corporate crime is an attempt to get back to the original concept formulated by Sutherland. It was to surreptitiously reinstate the ideas of high status and respectability into the white collar criminal, but this term too is going to run into exactly the same problems as Sutherland's original formulation. People who do not qualify by being high status or by being

* Edwin H. Sutherland 'White Collar Criminality' *American Sociological Review* 5 (194) pp. 1 – 12.

** D. J. Newman, 'White Collar Crime' *Law and Contempary Problems* 23 (Autumn 1958) p. 737.

*** M. B. Clinard, *The Black Market: A Study of White Collar Crime* (New York, 1952).

respectable are still going to commit these crimes, and it is going to be almost impossible to arrive at a set of crimes which are simply the crimes of high status people.

If I had built in the concepts of high status and respectability then I would have made the whole study quite viciously circular. I would have been stating that the people that I had chosen to study simply because they were high status, were in fact in high status occupations; that the people that I had chosen to study because they were older because they were more respectable, were in fact older and more respectable. I do not believe that this is the way that the problem should be approached. I think the only proper approach is to take a group of offences which criminologists have by previous research come to see as occupational and use these as a basis to study the people found guilty of them. It does not matter whether they are of high or low status or what occupation they are in. These are things you discover and are not the beginning point from which you launch your investigation.

I think an example might make my meaning clearer. If a company director embezzles $1 million using sophisticated techniques and knows full well the loopholes in the law which will help him conceal his crime, I do not think there would be anyone who would have any hesitation in calling him a corporate criminal. Yet if a cashier steals a $100 or more people may have qualms in calling him a corporate criminal. The distinction is not in the offence itself. It is in the amount stolen, the social status of the offender and the skill with which the offence was committed. If I had selected anything but the offence itself as the basis of my study I would have been involved in the worst form of circularity.

A final point that I would like to make is about the completeness of the paper. The offenders that are studied in the paper do not comprise all the white collar or corporate offenders for 1973. Soon after I was commissioned to write the paper I realised I could not cover all the offences committed. For example, the records of the Corporate Affairs Commission were not in a manageable form at the time and could not be analysed in time to present at this seminar. Further studies are needed in this area, and the Bureau of Crime Statistics in conjunction with the Corporate Affairs Commission intends to do an intensive study of corporate type crimes. Nevertheless, although the group that I have studied is not a complete set of corporate or white collar offenders, I am sure it is an appropriate set.

COMMENTARY

M. F. Farquhar, O.B.E., E.D., Dip. Crim., S.M.,
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Mr Sutton has provided valuable statistical data in respect to persons guilty of an occupational class of crime. He concedes quite early in his paper that it could not be regarded as an analysis of corporate crime.

Basically his purpose has been to compare the characteristics and social background of persons committing acts of dishonesty, generally where corporations and employers were the target, with other classes of offences. From this Mr Sutton has forged a profile of the occupational offender. It is quite startling to discern that many of the characteristics of these people so closely approximate those of the average member of the community.

The statistics have been compiled and analysed most carefully and appear to me to be not susceptible of much criticism or comment. The author makes his comparison with what he terms 'violent' and 'non-violent' offenders. Studies suggest that, generally speaking, criminality commences at 14 or 15 years of age, peaks at 19 or 20 and 'tails off' at 25. However, it cannot be really surprising that these occupational offenders commence such activities at a significantly later age. You would have noted the ratio of those under 20 as about 1:4 and those 20–24 as almost 2:3.

Many of those included in the sample would have been employed by corporations and were not likely early in their life to have reached a position where they would be able to so act; e.g., junior clerk-teller. Nevertheless, the contrast is significant. It certainly emerges that this class of criminal behaviour is very much the preserve of an older age group. It was certainly topical in International Women's Year that the female sex should stride ahead. Of course they may not be comforted by the knowledge that they compete a little better with men in false pretences and embezzlement than in almost all other offences, with certain notable exceptions.

I am quite sure it was not and is not the aim of the educationalist to deflect people from being thieves and to point them in the direction of embezzlement, but the significantly higher educational background of the latter class suggests reward in further research into this area. One could be confident that similar studies of the corporate criminal would make such a comparison even more vivid. It would seem to me that the marital status figures by and large reflect and continue what was drawn from the study of the age characteristic.

One cannot dispute the validity of the statistical appraisal of the previous conviction background. Nevertheless, it might be a little misleading. In the summary court at least, not infrequently, we are confronted with a false pretender who has a particularly lengthy background of previous

conviction – almost always for like offences – valueless cheques, credit by fraud and the like. So whilst the statistic as to non likelihood of him being a recidivist is undoubtedly correct, those that do repeat do so consistently. It may be that a fairer picture of these offenders would have emerged if the factors of alcoholism and gambling addiction had been given due weight. I do well understand that the statistics available to Mr Sutton did not afford him the opportunity to assess the weight to be given these two addictions in this kind of deviance. My experience is that they are powerful contributing factors particularly in the case of the incorrigible.

When sufficient data about the corporate criminal is available it must make a fascinating study. I felt it incumbent on me to devil out some something of what has been said by others in that respect. Statistics certainly point up the association between property offences, especially larceny, and lower socio-economic groups. Rarely do persons of the professional class commit an act of stealing or housebreaking. More likely than not, many offenders steal, as Mannheim put it, perhaps as a natural reaction to belonging to what they see as an underprivileged class. But is there any correlation between the corporate criminal and class? It is unfortunate that lack of data compelled the author to focus on material that included just one side of the issue, crimes against corporations. We are left to ponder the psychology and characteristics of the corporate criminal.

Generally he seeks to exploit the weakness of society and its rules rather than react against lack of privilege or inequity. Some have attained considerable notoriety, from Horatio Bottomley to Lord Kylsant it could be said that what they have done is to exploit human avarice. When Sutherland spoke of white collar crime he generally referred to persons exploiting their fiduciary capacity from within a corporation to their personal advantage. He asserted that it had five elements:

- it was a crime;
- committed by a person of respectability;
- of high social status;
- in the course of his occupation, and;
- in violation of trust.

By 'respectability' I would surmise that Sutherland meant only absence of previous convictions and any stigma. And perhaps, too, the attainment of such a position in the community as to encourage trust. Patently he intended a distinction between respectability and social status.

Modern society is of necessity based on mutual trust. Despite legal decision identifying the individual responsibilities of directors, economic life has become much too complex to permit any systematic evaluation of respective trustworthiness.

Sutherland had asserted: 'Business leaders are capable, emotionally balanced, and in no sense pathological'. There seems little justification for this sweeping assertion. He went on to negate other problems; for example,

as to their being psychopaths or neurotics. Regrettably there is a dearth of material on this psychological side of the subject. Frankly, this is not surprising. Courts are generally interested in the element of knowledge and intent, but seldom would a psychiatrist be called. Whatever definition you adopt of a psychopath it is almost universally agreed that they may be found as brilliant soldiers and acute businessmen – insupportable husbands but as well as violent and incorrigible criminals. I would assert that a man who can fleece small investors of their life savings certainly fits comfortably into all definitions of a psychopath.

When I think of corporate crime, my thoughts centre on false prospectus, insider trading, tax frauds, manipulation of accounts, fraudulent application of the moneys of a company, trading to defraud creditors (nearer to kind of person an author was discussing), exploiting and polluting environment and grossly false advertising. These offences demand greater research. It is pertinent to ask why in our modern society certain crimes are noticed, whereas others are substantially ignored.

There is a trend to find a more satisfactory solution to the criminal liability of corporations. I commend to you reading an article in *The Journal of Criminal Law and Criminology* V 65, 2 (1974) by Professor Pepinsky of the State University of New York and entitled 'From White Collar Crime to Exploitation – Redefinition of a Field'.

Finding a policy basis to regulate insider trading is causing concern overseas as well as here. It cannot be gainsaid that unfair profits can be made in share dealings by the improper use of confidential, price-sensitive information that is not generally available to the investing public. This was noted in a 1973 White Paper in the United Kingdom and is discussed by Robin White in Vol. 90 of the *Law Quarterly Review* (1974).

In the United States there is a trend to make statutory offences of this class of behaviour. As Snell points out it has always been open in a civil action to follow profits through to both the 'tippor' and the 'tippee'. Some American States have now made it an offence for persons to transmit or trade inside information from a corporate fiduciary and are liable for resulting profits as well as other penalty.

I am indebted to the Corporate Affairs Commission for data extracted from 1974 reports. During that year they initiated 5,730 actions. Many of course were for failure to lodge certain returns. Frequently, where there is no suggestion of other than dilatoriness, these are withdrawn when appropriate returns are filed. Nonetheless 1,708 convictions produced $62,385 in penalties. As well as those of a summary nature, 301 proceedings alleging indictable offences were instituted. Frequently these included multiple offences against the one offender, and offences against a multiplicity of offenders charged jointly. These included directors failing to deliver up property to liquidator; making false statement in returns and also in documents; fraudulently taking and applying property of a company;

conspiracy to cheat and defraud; fraudulent trading; and making false statements in prospectus. It seems certain that in the near future some synthesis and evaluation of the corporate criminal should be possible.

If I could conclude with a few words on sentencing. I am not so sure that all said here by Mr Sutton is so well founded. Despite this being an age in which the individualisation of punishment is to the forefront, nevertheless the person confronting the court quite frequently is an incorrigible offender who; on the present state of knowledge, in the interests of the community can only be put out of circulation. From the literature available for research, from our own experience and, indeed, from what has fallen from the author here there is little to distinguish this offender from the ordinary public. He is just less scrupulous.

Whatever may be said of Mr Sutton's class of offender overseas experience especially the American and the United Kingdom indicate that only the most condign punishments can have any deterrent value at all. This simply because of the vast amount of the illegal gains available to this kind of criminal.

THE SANCTION – RETRIBUTION OR REHABILITATION? WHAT IS TO BE DONE WITH THE CORPORATE CRIMINAL?

His Honour Judge A. G. Muir, Q.C.
Judge of the District Court, New South Wales

In attempting to formulate and express some views as to what is to be done with the corporate criminal I have had regard to the seminar conducted by the Institute in May, 1974, when a paper was presented by Mr J. B. Goldrick S.M. *concerning the treatment of persons offending against the legislation dealt with there, namely the *Companies Act*, the *Crimes Act* and the *Securities Industries Act*.

I think properly white collar crime is accepted as extending beyond corporate offences and it seems appropriate to me that the determination of the question – retribution or rehabilitation – requires, in the first place, a determination of just what crimes the legal process is concerned with. I, therefore, propose as shortly as possible in the first place to refer to the views of some text writers, both as to the nature of the crime and the possible rehabilitation or otherwise of offenders convicted of such crimes.

It is well recognised that the term came into use after 1939 when the late Edwin Sutherland used it as a title for his address before the American Sociological Society. As D. C. Gibbons *(Society, Crime and Criminal Careers*, 2nd Ed. Prentice-Hall, 1968) points out, Sutherland in one place described the term as follows:

> *White collar crime may be defined approximately as a crime committed by a person of respectability and high status in the course of his occupation.*

In another place he said:

> *The white collar criminal is defined as a person with high socio-economic status who violates the laws designed to regulate his occupational activities.*

It seems his first definition would cover many of the crimes which are daily before the criminal courts of this State but the second removes a great number of crimes from that category.

Most text writers, however, appear to agree that Sutherland's object was to achieve the recognition of the community as a whole that breaches of 'laws designed to regulate occupational activities' were indeed crimes and, in many instances, more harmful to the victim than the more generally recognised crimes. It would seem to me not unreasonable to say that in part Sutherland's object was to demonstrate to the offenders themselves the

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* See Syd. Inst. Crim. Proc. No. 19 (1974) pp. 54–77.

true nature of their activities. To this extent he was probably concerned primarily with possible rehabilitation by reason of this recognition. However, on the other hand, once recognition of these activities as crimes is achieved it leaves the way open to deal with the offenders by way of retribution rather than rehabilitation.

Donald R. Cressy *(The Respectable Criminal)* considered that Sutherland's position was confused by the fact that he studied corporations rather than white collar criminals and he then set out to correct this defect by making a study of embezzlers, as he regarded this category of persons as white collar criminals.

George B. Vold *(Theoretical Criminology* N.Y.: O.U.P. 1958) includes in the category of white collar crimes those committed by persons whose identifications are with non-law-abiding persons and endorse a manner of living not favoured by the political majority. He described this type of person as:

> *The white collar business executive type of person who persists in outlawed business practices with no sense of wrong doing or crime only feeling that he is being persecuted by authority. This is true of both individuals and of the corporations sometimes managed by such individuals.*

In the context of the subject presently being considered Vold then draws a significant conclusion that no technique is presently known from which it is reasonable to expect the successful rehabilitation of such a person. He says education and training programmes usually have little or nothing to do with the central problem.

He further proceeds to include in the group of white collar criminals the educationally 'average' person whose commitment to crime is that of any professional person in his chosen field of activity. This type of person has a typical field of operations in, for example, supplying some illegal service or product for which there is an effective economic demand. Vold again makes a significant statement that rehabilitative penology has no point of contact with this group. The individuals are as well adjusted as ordinary businessmen. Further, he says there is no reasonable chance of rehabilitating these individuals in a prison or otherwise.

D. C. Gibbons appears to take an entirely different view of the nature of white collar crime and describes this type of violation as a criminal act in which an employee steals or violates the law for the benefit of his employer and excludes crimes such as embezzlement, which are stealing from the employer. Since the employer does not encourage or sanction the latter activities Gibbons says they cannot be classified as white collar crime.

Quon Y. Kwan, Ponnusamy Rajeswaran, Brian P. Parker and Menachem Amir in their article 'The Role of Criminalistics in White Collar Crime', *Journal of Criminal Law, Criminology and Police Science,* Volume 62 (1971) are concerned with the role of criminalistics which, as defined, is

of no relevance to this paper. However, in dealing with the types of offences which they have included in this category they refer to food and drug violations; false advertising; tax evasion and insurance fraud.

Richard D. Knudten *(Crime in a Complex Society – An Introduction to Criminology* Homewood. Ill.: Dorsey Press, 1970) says of white collar crime:

> *Many businessmen, similar to professional thieves in attitude, express, therefore, open contempt for law, government and regulative agency personnel, arguing that the least government is the best government. They regard legal restrictions as an infringement upon their free enterprise.*
>
> *White collar crimes are usually organised and deliberate, designed to maximise profits without regard to the public.*

It is to the point in this context, I think, to quote Knudten's view as to the three major social effects produced by white collar crime:

> *The sale of harmful drugs or impure food in violation of drug and food laws may result in physical injury or death of the consumer. Fraud, embezzlement, and the marketing of worthless, defective, or even injurious products may also lead to major financial losses. White collar crime, however, takes its greatest toll when it undermines group values and the sense of honesty which undergird all social, economic, and political institutions.*
>
> *Since the judge, legislator, commission member, and white collar offender belong to the same social class and share similar status and identification, white collar criminals are not generally processed as common criminals.*

A consideration of the views expressed by the writers above I think demonstrates that there is still considerable conflict as to the type of crime we are concerned with and, thus, I think some confusion as to how the violator should be dealt with.

White Collar Crimes to be Considered in this Paper

What type of conduct then should be considered white collar crime? For the purpose of expressing a view in answer to the question posed for consideration I have accepted as falling within the category offences committed by persons in the course of their occupation, whether they are in executive positions or otherwise, and whether the offences are committed for the benefit of an employer or against his interest; those who indulge in outlawed business practices and necessarily those who commit offences as provided in various statutes, for example, the *Companies Act,* some provisions of the *Crimes Act* as they affect corporations and officers of such bodies, and the *Securities Industries Act.*

It will be seen, therefore, that included in the categories abovementioned will be the person who embezzles moneys of his employer or who commits the offence of larceny as a clerk or servant. These types of offences are dealt with daily by the Courts of this State and I do not consider require any special consideration in this paper, there will no doubt be cases of this type where rehabilitation is probably appropriate. Further, there will be found, if one examines statistics, numbers of cases where persons who have committed this type of offence are granted a recognizance rather than suffer a prison sentence. I suspect the explanation for this will frequently be found to be the desire of the Court to see that the victim is compensated, particularly in the case where he would be a substantial loser. Despite this, the Courts of Appeals have, on many occasions, said that any offence involving a breach of trust must be recognised as one which will involve a severe punishment.

What is the role of retribution in dealing with offenders?

This aspect of the questions asked should be considered in the light of modern approach to sentencing in the Courts. In *R.* v. *Goodrich* 70 W.N. (N.S.W.) p. 42 Street CJ. said:

> *It has to be borne in mind that imposing a sentence this Court must always give a careful consideration to three aspects of the case. There is the retributive aspect, the reformatory aspect, and the deterrent aspect.*

So far as the facts of that particular case are concerned they are unimportant for present purposes but the Chief Justice did add that the disruption of the life of the appellant, which otherwise had been exemplary, might well satisfy the retributive aspect of the penalty he was to incur.

Herron CJ. later referred to that Judgment in *R.* v. *Cuthbert* (86 W.N.) (Part I) (N.S.W.) p. 272, where he said:

> *Courts have not infrequently attempted further analysis of the several aspects of punishment, where retribution, deterrence and reformation are said to be its threefold purpose. In reality they are but the means employed by the Courts for the attaining of the single purpose of the protection of society.*

If retribution then is to be the attitude of Courts and other bodies dealing with white collar criminals then in the light of the statements above, it should be considered only where necessary to protect the community generally and not as a means of seeking revenge against the offender.

General Observations

Many of the persons with whom the comparatively recently established Consumer Affairs Bureau are concerned would fall within the category of white collar criminals as outlined by some text writers.

This Bureau has followed the practice, now well-known, of reporting the names of individuals and corporations against whom complaints have been established in respect of what might be called 'shabby business practices'. The report of the Bureau is then published in the daily press. Necessarily, of course, this is a means of dealing with 'white collar crime' as it is accepted by some text writers, outside the Court. The question is what effect does the publication of these complaints, which have been established, have upon the individuals or corporations? If it means a loss of business and produces an unwillingness within the community to deal with the individual or the corporation in respect of any business activity, then I would think that the publication of the details is truly an act of retribution, or, rather protects the community generally against possible future action by the individuals concerned. I think Sutherland would regard this as inadequate treatment of the persons concerned and would advocate that such practices should be recognised as crimes and dealt with in the same way as the generally recognised crime and, in all probability, in the Courts.

I would suspect, however, that most members of the community would heartily approve the practice particularly if they happened to be a victim.

It is to the point to refer to the *Trade Practices Act* which provides that where a person contravenes the restrictive trade practices provisions of the Act, the Industrial Court may impose substantial pecuniary penalties. The maximum penalty provided in the case of an individual is $50,000 and a body corporate $250,000. However, it is specifically recognised that these proceedings are not criminal and are proved on the civil onus. On the other hand, contravention of the consumer protection provisions give rise to prosecution for an offence and in the case of a person provides a maximum penalty of $10,000 or imprisonment for six months and in the case of a body corporate a fine of $50,000.

Penalties of the type mentioned above, even in the case of a non-criminal act, must surely demonstrate that the legislature was concerned with the retributive aspect of any penalty and, necessarily, was concerned with the protection of the public. Thus, it would appear the legislation is directed towards a general deterrent to other individuals or corporations which may be offending against the provisions of the Act or who may be likely to offend.

One of the problems of prosecutions for white collar crime is the extraordinary length of some proceedings against individuals. We are all familiar with many lengthy cases in recent times before both higher and lower courts and in Appeals Courts. Professor Hawkins, in addressing

himself to the problem of white collar crime, recently referred to a report of the New South Wales Corporate Affairs Commission which records that reports from liquidators alleging that 650 companies had committed offences under either the *Crimes Act* or the *Companies Act.* The report stated that only thirteen matters arising from these alleged offences were listed for consideration of the Courts.

It is not an unreasonable conclusion, I think, that persons who set about committing this type of offence are aware of the difficulties, firstly of investigation to determine whether any offences have been committed, and then of the difficulties of establishing the offences before the Courts. Therefore, this must in the ordinary course of events induce a person thus inclined to commit such offences, particularly when the reward is likely to be very substantial. In this context where a person is convicted before a Court or where he is found by some other statutory body to have breached the Law, what is the appropriate approach retribution or rehabilitation?

Conclusions

It has been said with some force that the corporate structure with all its ramifications provides a greater opportunity for wrong doing and sharp practices than was otherwise available. Directors occupy powerful positions and not only wealthy people but those with little to invest are often forced to rely upon their representations and in the ultimate, in many instances have suffered the loss of their savings.

With respect, I agree with the sentiments expressed by Vold that there is no technique presently known from which it is reasonable to expect the successful rehabilitation of such a person.

Any examination of the statistics of countries where society has become more complex than in this State establishes the growth of this type of crime.

While the modern approach to the treatment of persons convicted of crime is to seek the rehabilitation of the offender, not only for his benefit but to relieve society from the commission of further offences, it is necessary to seriously question whether such an approach is appropriate in dealing with persons who commit white collar crimes.

One would always have to acknowledge there could be an individual case where rehabilitation, for one reason or another, may be a correct approach, but I would express the view that the only course likely to achieve some measure of control is the imposition of a severe penalty which would involve a substantial element of retribution in order that the public generally may be protected. Surely, it is only in this way it will be demonstrated to the offender or likely offender, that despite all the complexities of investigation and prosecution, he will suffer severely either financially or by imprisonment, if ultimately convicted.

In various professional fields disciplinary action is taken in public and is thus subject to considerable publicity comparatively shortly after the happening of the events giving rise to the action. Examples of this type of hearing are proceedings before the Medical Tribunal; the Law Society of New South Wales and the Appeals Court of this State where complaints of substance against legal practitioners are dealt with in open court. It may be considered as desirable that the activities of directors and others associated with corporations when complaints are made and substantiated should be subject to full publication on a similar basis. This may involve the establishment of an appropriate authority and, as in the case of the investigations of the Consumer Affairs Bureau, the publication of established complaints. This may well be likely to contribute substantially to the protection of the public far more appropriately than the knowledge that, some years after the events giving rise to prosecution, the offenders have been convicted before court. The protection of the public in this way, if it involves retribution, it is to be approved.

A consideration of the foregoing suggestion raises the question of possible prejudice to individuals who are ultimately prosecuted. If publicity is given to established complaints against such persons as directors of corporations and the publicity represents the findings of a statutory body or authority established for that purpose, then prejudice could well result when an individual ultimately is tried before a court on the same facts. At least to a lawyer's mind this must be a matter for concern. Nevertheless, if it is correct to say that the long delay in the resolution of matters before the court protects the offender rather than society generally, then it may be considered the time has arrived when the benefit of society should prevail over that of the individual. Any course of publicity intended to protect the public generally must have as one of its prime purposes the identification of those areas to the public so that they may realise the nature of the white collar crime and the extent to which it is practiced by corporations or by individuals within corporations.

Any such course must involve a substantial element of retribution. However, a consideration of the type of individual involved in these violations must indicate that any thought of rehabilitation is futile; they will either never offend again, or alternatively, if their activities are directed towards the benefit of their employer, the rewards are usually far too great to found any hope of their rehabilitation and the answer must be retribution.

In summary the conclusions drawn are:

- White collar crime should be adequately identified.
- Once identified, where that crime involves the complex operations of the corporations, then methods should be sought to quickly and adequately publish to society generally the complaints established before an appropriate authority.

- Where prosecution is the approach then the penalties provided and imposed must be for the protection of society generally.

- This paper has not been concerned with crimes such as conspiracy and embezzlement or crimes habitually dealt with by the court. In these cases it is considered the principle is well established by the Courts of Appeal that they must be the subject of a severe penalty in order that society may be protected.

- The present delays in finalising prosecutions denies that protection to society in an area where society is ruthlessly exploited.

- Any procedure to expose or prosecute individuals or corporations must be for the protection of society and rehabilitation of particular individuals is out of the question except in so far as society itself as a whole exposes and condemns this type of business practice or white collar crime.

PRESENTATION OF PAPER

His Honour Judge A. G. Muir, Q.C.,

In speaking to my paper I wish to make three points.

As I have said in the paper the problem raised for me of retribution or rehabilitation, involves most specifically the question of identifying the type of crime involved, and for this reason I think that any further investigations and further considerations should attempt to limit within fairly sound borders the type of crime we are concerned with. Many of the matters that Mr Sutton has referred to are before the courts day after day and I would be reluctant to include those under the category of white collar crime. I am not criticising his selection, and he has given the reasons for it, but if you do accept his categories and look at the question of what the sentencer should do I think it must be understood that these categories significantly include men and women who are repeatedly appearing before the courts. In many instances they have stolen money over long periods from their employers and from fellow employees. I consider that numbers of these people, probably a majority, have shown no sign of remorse whatsoever. Indeed, I think they consider themselves to be victims of society, and I doubt if any atempt at rehabilitation would have any success. Further, I think it would be futile. I have had cases where I have tried to adopt what I thought was a humane attitude, and I discovered over the years that the assistance given by Probation and Parole Service to those cases was without avail. This would only lead to a view in the type of case, as referred to by Mr Sutton, that one can only protect the community: to attempt to rehabilitate is a futile course.

The question posed in this seminar is: can the legal process handle the problem of white collar crime? I think it is therefore relevant to say that with lengthy investigations and later lengthy hearings that in the event of a conviction the passage of time presents a very human and a very difficult problem for the sentencer. It is very hard, I think, to consider retribution as an appropriate element of any sentence when the crime was committed perhaps five to eight years earlier than the sentencing and there has, in many cases, been a complete change of circumstances. Now as envisaged, by the late Chief Justice Sir Kenneth Street, and mentioned in my paper, in *Goodrich's* case it may well be, as he thought, that the disruption to a person's life, the loss of probably all his personal possessions, his home, his wife being driven out to work is sufficient to satisfy the retributive aspect of any punishment. If that is so, then a light sentence or a light penalty will be justified. On the contrary, of course, the argument is that no matter how long it takes, justice and the interests of the community will prevail and ultimately will overtake the offender with possibly a prison sentence.

My third comment is this – that corporate or white collar crime rather suggests to me the type of crime that should be considered is that in which individuals have used a company or a corporate structure to commit a crime. In this area again, as Mr Sutton has suggested, with respect I agree, it may be that there has never been sufficient rigorous investigation or

prosecution; but it is in this area in particular that I raise the question whether the rights of the community should not supercede the rights of the individual even though this may involve prejudice to the individual ultimately in a prosecution.

This again in turn would raise the question of the numbers of reports of appointed Inspectors in this State alone who have investigated the affairs of various corporations. Those reports or the contents thereof, of course, do not become known for a very obvious reason we all appreciate and the reason that has been announced by more than one Attorney-General from time to time. The report is withheld for the reason that it could, in ultimate prosecution, prejudice the individual. I raise this question that in an increasingly complex society looking at white collar crime in the context of the use of a company or corporate structure to commit the crime, that this course may not now be justified. Mr Justice Sheppard has commented that perhaps this type of enquiry should be carried on in public. The individual could be protected as to his answers but, nevertheless, he would not be protected from any prejudice that might arise as the result of publication of those proceedings. If this is the correct course then it leads to the further thought. In many of these areas, which we determine are white collar crime, should there not be an established permanent authority with sufficient competence to hear complaints in public and make findings in public in regard to the type of activity we are concerned with here tonight? This, I think, is a reasonable and proper consideration in this context in order that two particular aspects may be satisfied: firstly that the community generally may know the type of crime that is being committed and how it is being committed, and secondly the individuals against whom such complaints are made.

COMMENTARY

The Honourable Mr Justice F. C. Hutley,
Supreme Court of New South Wales

If I do not, as everybody else has done, congratulate the last speaker it is not because I do not appreciate his paper, but it is because I do not believe that the business of a commentator is to act as a kind of advertising agent. The business of a commentator is, if possible, to concentrate on matters in the paper about which there may be some doubt so that they can be discussed.

I am peculiarly unfitted to comment on Judge Muir's paper because I have had little experience of the white collar crime to which he has referred and none, of course, of the kind that Mr Farquhar was eloquent about, but I have had something to do with two types of white collar criminal: one, the defaulting solicitor, and the other the company director. The company directors I have had something to do with are not white collar criminals in the proper sense because the criminal process never caught up with them, but the knowledge I acquired can assist in understanding the situation.

When one talks about rehabilitation of such people, as is pointed out in the paper, it has little meaning. I feel that one has to begin by really thinking about what is meant by rehabilitation. It is, of course, what criminologists thrive on, but there is a kind of dominant and servile relationship involved in rehabilitation and in talking about it. Nobody talks about rehabilitating Robin Hood but there is a lot of talk about rehabilitating the small criminal. From previous discussion it appears that in corporate crime there are two classes: the high corporate criminal, such as the defaulting solicitor and the high company director, and the small time operator who passes cheques and the like.

To the first class not only has rehabilitation got no meaning but the courts are mistaking their role in even thinking about rehabilitation. Most of the people in that class ultimately succeed in rehabilitating themselves. They have skills and attributes which they can use again in society. A considerable number of solicitors who have been involved in crime, though they are not readmitted to the profession, have prospered greatly in activities in which they can use their legal training and in which they are uninhibited by professional restrictions. One such gentleman said to me that the day he was struck off by the Supreme Court was the best day in his life. I think that when you talk about rehabilitation you have to very carefully grade the classes that you are dealing with.

In dealing with what we might call the 'high criminal' there is only one real question 'What is the appropriate warning to those who attempted to follow after?', and I do suggest that it is very important where exemplary sentences are inflicted that every use should be made of early release and parole, because many of these people if earlier released can rehabilitate themselves and can become tax payers again.

In regard to publicity I completely agree with Judge Muir. Publicity is the greatest penalty a true white collar criminal can experience but publicity must be quick. For that reason I have always thought it is a great pity that publicity has not taken the front role in many cases. It could quite well be a good thing to publish the reports of Inspectors as soon as they are produced even though it may prospectively abort a trial. It would undoubtedly assist in the enforcement of civil remedies. People who have claims against these people are impeded by the desire to give them a fair trial. In many cases I would think that publicity, speedy publicity, would be an infinitely more effective sanction than any type of criminal proceedings at all. We tend to overvalue the significance of criminal proceedings.

I would like to raise my voice in defence of directors. From the speech of the Attorney-General down the class of directors have undoubtedly, to my mind, been unfairly pilloried. For one thing the ordinary director does not exercise a position of power as is stated in His Honour's paper. That is the only passage of his paper that I would seriously challenge. The governing Director or the Managing Director does, but the poor unfortunate ordinary director, under company law, is limited in having access to the company's papers. Only with the consent of the Board can he really rummage through the company and he is in the hands to an enormous degree of the company executives. To treat all directors in the way that has been suggested here would not only in my mind cause a great injustice collectively to a class of directors, but make it very difficult to get people to act as directors. It is the independent amateur director who to some extent acts as a check, though an imperfect one, upon the executive directors who are the people making insider profits and the like.

One of the results of the great campaign against directors in the press, from the Australian Government and from the Corporate Affairs Commission will be to make it very difficult for people to be persuaded to be directors, particularly as, speaking as an ex-director, the remuneration of directors in this country is quite miserable and totally unworthy of the kind of harrowing which Mr Swan has sketched as one's fate if the company gets into trouble. To treat directors as a single class only exhibits an ignorance of company structure. Maybe when the Attorney-General does revise the *Companies Act* he may completely transform the role of directors but it would I think be right that people should understand the role of the directing class. The executive director or controlling director has the role and opportunities described but not the ordinary director. The ordinary director is, unless the Corporate Affairs Commission becomes infinitely more inefficient than it has been to date, one of the real checks upon internal mismanagement.

COMMENTARY

W. R. McGeechan, AASA ACIS,
Commissioner of Corrective Services
New South Wales

I am not an advocate for His Honour Judge Muir because I disagree violently with most of what he said because it does not coincide with my own personal views on this topic.

Democracies invariably turn to the criminal case to tidy up its social problems, and I find it not in the least amazing that we suddenly discover an increase in corporate or so called white collar criminals directly related with the number of public servants now being funded by an understanding government to pursue this phenomenon. I said to Commissioner Frank Ryan recently 'The more officers you get the more of these white collar criminals we are going to discover!' I do not know whether he has forgiven me yet.

On the other hand I did say publicly once in the presence, I think, of Gordon Hawkins that some of the most interesting people I knew were white collar criminals.

In my attempts to reconcile the varying claims between retribution on the one hand and rehabilitation on the other I am reminded of that man who went from Jerusalem to Jericho where it is said that he fell among thieves. They stripped him of his raiments, wounded him and departed leaving him half dead. The analogy is not unlikely for any law enforcement officer involved with the criminal population following conviction. People differ violently on the after conviction process, it is either too harsh or too soft; never just exactly right.

Most people concerned with the law enforcements invariably find themselves in that position. All too frequently we tend to ignore the view of the criminal as to whether he is in the least interested in either retribution or rehabilitation. As a generalisation it would appear to me that the professional criminal expects retribution which he takes as somebody said 'in a professional manner' and he is not very interested in rehabilitation. What we require, of course, is that he be prepared to accept rehabilitation, whatever that vague word may mean.

With all due respect, His Honour Judge Muir's written comments on this vexing subject leave me in a state both confused and depressed as they appear to cast a gloomy prognosis for rehabilitation of the so called white collar criminal. Let me also say that I think that we are relying too much on history. We say that in the past this has happened. We see that this is the common characteristic of the so called white collar criminal and we are not predicting the future with sufficient accuracy or energy. I am conscious that the United Nations has abandoned as a study the causation of crime and I think that is depressing, but what we should be looking at is how

best to solve the phenomenon of white collar crime or the white collar criminal without looking too much at history. I do not think that we should rely upon statistics.

However, I take some solace in the thought that the criminologists mentioned in His Honour's paper are essentially writing on matters of history, and I am conscious that criminologists from time to time do touch on matters of practical criminality.

As I see it certain things are required of my service in the best interests of the community, and these are to be achieved preferably with an absolute minimum of fuss and with an absolute minimum of expenditure. What is essential, of course, is a great deal of fuss and a great deal of expenditure to achieve it. The community is not at all restful with that concept.

The first of the requirements is the reduction of future crime with all that entails. I am sure that there would be few people here, actively interested in the criminal process, who are much concerned with history, and the point has already been reflected by His Honour saying that he sees some inadequacies in the concept of dealing with events five and six years past.

The second thing that is required is an ostensible and overt satisfaction of that oft expressed but essentially transient and immeasurable quality of so-called moral outrage. I think that there is an extraordinary amount of emotion from the community associated with the treatment of the so-called white collar criminal. This arises largely because of the outlook of society that more is expected of them.

The third thing expected of my service, and one which I strive for, is a clinical objectivity and a non-emotional approach to the vaguely and poorly defined concepts of punishment, rehabilitation and retribution. What is called for really by the society we service is a need to demonstrate some form of pragmatic achievement in an area that is essentially founded in failure, and how rapidly you, as good members of the community, rush to measure failure and how reluctant we are collectively, as a community, to measure success.

Without developing the argument beyond the point of introduction I take the view that unless rehabilitative and deterring philosophies are vigorously pursued the ultimate retribution will be too extreme to even contemplate, and that if we cast aside the rehabilitative and deterring processes I hesitate to think the demands that society will impose on the white collar criminal.

My commission must therefore as best it may in the light of conflicting ideologies reconcile retribution and rehabilitation into a common measure in a genuine attempt to reduce future crime. As I said 'History is history and may not be altered.'

COMMENTARY

Associate Professor G. J. Hawkins,
Faculty of Law,
The University of Sydney.

I think His Honour Judge Muir was probably misled by us in the sense that we suggested that there were only two alternatives, that is retribution or rehabilitation. One of the troubles with the notion of punishment is that the principles on which it is based and the reasons for which we appreciate it, the reasons for which we demand it in our society are much wider than this. Ludwig Wittgenstein*, perhaps the greatest philosopher of this century, wrote very little about punishment but was once asked about the question of the justification for punishment and why we punish people, and this is what he said:

> *There is the institution of punishing criminals. Different people support this for different reasons, and for different reasons in different cases and at different times. Some people support it out of a desire for revenge, some perhaps out of a desire for justice, some out of a wish to prevent the repetition of the crime, and so on. And so punishments are carried out.*

What he was saying was that there is not a single, simple answer to the question of why we punish people or what justifies us in punishing people; that there is an enormous complex of reasons. There is vengeance, the public demand that outrageous crime should be met with harsh reprisals, the belief in justice and desert, the belief that there are certain people who deserve to be punished. Retribution is a very powerful idea. Of course there is also deterrence; the feeling that by punishing these people, making an example of them, we will deter other people. There is also the hope that we may be able to reform or rehabilitate some of them. Finally there is the feeling that if we put some of them away for a long enough time (no matter what happens to them when they get out) while they are in they will not be committing offences against us.

There are people who feel that there is something in the constitution of the universe which demands that evil, moral evil, should be matched by some suffering on the part of the people who are responsible for this evil. There are people who feel we should punish people merely to vindicate the law.

One of the major problems is that, in talking about the subject of punishment and how you treat particular types of offenders, we go very deep into human emotions and feelings.

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* L. Wittgenstein, *Lectures and Conversations on Aesthetics, Psychology, and Religious Belief* (ed. C. Barrett 1966) p. 50.

Rather than try to unravel this tangle let me make just one simple observation about the treatment of white collar criminals: we find it easier to identify with the white collar criminal, he is always one of 'us', not one of 'them'.

His Honour, Mr Justice Hutley, was speaking about company directors and of the miserable remuneration that company directors receive. Yet I am sure there are many people in Australian society who would not really feel the same way as he does about the poor situation of company directors. There are many people who would feel that company directors were rather well off as compared with themselves, and it seems to me that the criminal justice system is on the whole rather sympathetic to company directors as opposed to ordinary offenders.

I think that we are all aware that white collar crime, especially corporate crime, occurs. We remember all the spectacular company crashes of the 1960's. We remember the sensational stories and sensational activities of mining companies and so on. We remember the Report of the Senate Select Committee on Securities and Exchange. We have talked about widespread abuses and malpractices in the securities industry and we remember Senator George talking about appalling stock manipulations and fraud and massive insider trader profits. I do not think that anyone questions that these things occur. But if you ask the more precise question 'What is the nature and extent of corporate crime in Australia?' or, if you ask 'What proportion of these offenders are prosecuted or convicted?' or, if you ask 'What sort of penalties are imposed (not provided for by the legislation)?' then we do not have the answers.

Now many of you will have been here last year with the Institute of Criminology* when we held a seminar on the subject of corporate crime and contributors to this seminar, Sir Richard Eggleston, Mr Olson, Mr John Valder, Mr Grogan, considered an enormous variety of topics: the duties and responsibilities of corporate officers under the *Companies Act,* the New South Wales *Crimes Act,* the *Securities Act,* the function of the investigation and prosecution division, the treatment of offenders against those Acts, the question of the adequacy of the law, the appropriateness of the sanctions. We did not get answers to all these questions, but Mr Olson, the Acting Chief Inspector of the New South Wales Corporate Affairs Commission, reported that of 2,587 companies which had been wound up either by the court or creditors voluntary windings up in the eleven years prior to 1973 approximately 650, or 25 per cent, involved Reports from liquidators alleging offences under the *Crimes Act* or the *Companies Act.* The total deficiencies in winding up were in the region of $151 million. Mr Olson went on to say that when you consider all those companies which were would up and did not lodge statements of affairs he thought the figure was closer to $160 million – $170 million. This is the figure for *one* state, New South Wales, of *one* aspect of corporate crime.

* See *Syd. Inst. Crim. Proc. (1974) No. 19* 'Corporate Crime'.

As to the question of treatment of offenders Mr Olson had something rather interesting to say. He analysed the matters for which either committal proceedings or trials were completed during 1973. There were thirteen matters listed in all. In five of these a *nolle prosequi* was entered; in four of the thirteen cases trials were completed and offenders were convicted. Of these, one involved charges of fraudulent misappropriation. Three charges of fraudulent misappropriation got a sentence of periodic detention. In the second a director was ordered to enter into recognizance for the sum of $500 to be of good behaviour for three years. In the fourth case a man charged with fraudulent misappropriation was ordered to enter into recognizance to be of good behaviour for two years and received compulsory psychiatric treatment. Not one offender went to prison: not one offender was fined.

In case you should think that this lenient attitude is characteristic of the treatment of offenders in the courts of New South Wales let me mention an offence committed by the very poor, by people at the bottom end of the social scale. *Minor Offences – City and Country** a study recently published by the N.S.W. Bureau of Crime Statistics and Research shows that in the inner city and suburban courts 40 per cent of those convicted of vagrancy receive a term of imprisonment; that in New South Wales country towns over 73 per cent of vagrants are imprisoned. What conclusion does one draw from this? That in the eyes of the law it is a much more heinous offence to be honest and without any money than to have remedied that deficiency by dishonest means?

These differential sentences may impart the reflection of the fact that if you have money, however dishonestly you have acquired it, you can purchase a somewhat better brand of justice. That is not a rhetorical assertion; that is a statement of fact. It has been clearly demonstrated by another Report from the New South Wales Bureau of Crime Statistics and Research entitled *Petty Sessions 1972.*** This Report is based on the analysis of the relation between legal representation and the findings of the Courts of Petty Sessions throughout New South Wales in 1972. It covers a wide range of offences, and it only excludes minor matters such as parking and allied offences. In order to avoid the confusing effect of previous criminal history it deals only with defendants who had no previous convictions of any kind. It demonstrates that there is a clear association between legal representation and securing less severe penalties.

My final remark is this: that whatever principles we support in relation to justice and whatever we think justifies punishment, whether it is retribution or rehabilitation, it seems to me that the truth is as Mae West once asserted – *I've been rich and I've been poor, and rich is better.*

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* *N.S.W. Bureau of Crime Statistics and Research, Statistical Report,* 18 (October 1974). Minor Offences – City and Country by M. F. Farquhar and T. Vinson.

** *N.S.W. Bureau of Crime Statistics and Research, Statistical Report II* (November 1973) Petty Sessions 1972.

DISCUSSION

Detective Sergeant D. Kelly, New South Wales Police Fraud Squad.

Speakers at this seminar have failed to look at the role of the investigator, i.e. the field officer who is charged with the responsibility of the investigation and collation of white collar crime, and the officer of the Corporate Affairs Commission who is similarly charged with the investigation of serious and complex matters under the *Companies Act.* With the exception of His Honour Judge Loveday, who proffered the idea of something align to *ex officio* indictments for white collar offenders, none of the speakers has touched on the investigation side of white collar crime.

Whether this could be done in the adoption in this State of our *Crimes Act* being associated with the English *Theft Act* is something for discussion. There is a great lack of expertise among our investigators in white collar crime which prevents them from fully appreciating the problems associated with the white collar field.

That is obviously an indictment against our department but it is said in sincerity, and it is equally applied to the prosecutors, the magistrates and the judges, and to the courts that handle these vast and complex matters. It is not unusual for some of these matters, such as lengthy conspiracies, to be at least five or six years old before they get to the District Courts. Witnesses forget their evidence, evidence is lost by way of age, and the delays are frustrating, to say the least, to the investigating officers.

Although we get close to these white collar criminals it is the police officers that are left out of discussions of this nature. I do not know of any police officer that has been called on to speak at a seminar such as this.

Another problem for members of the Fraud Squad is to decide which particular case warrants priority out of say ten complex fraud matters. How do we convince members of the public that where they have been defrauded of money it is merely a business venture, and the only redress they can obtain is through the Supreme Court in Equity? It is a problem on its own to convince such members of the public who are not versed in the techniques of our legal system.

P. Olson, Chief Inspector, N.S.W. Corporate Affairs Commission.

I would support fully the statement by Detective Sergeant Kelly. From my own experience I have wished at times that judges, when considering penalties, could read some of the letters that come to the Commission particularly in relation to major company collapses and

particularly letters from old people whose life savings have been affected in such collapses. These facts do not come out in trials or preliminary hearings and I think perhaps that if they did the penalties applied would be much greater than they have been in the past. The role of the Commission is to cause people to be brought before the Courts but of course the question of what sentence should be imposed is solely a matter for the Court itself.

I would recommend for discussion by this seminar two preventive actions, the first on a restriction in the Memorandum of Association of public companies and second in relation to the penalties provided in s.122 of the *Companies Act.* It is fair to say that the Memoranda of Association of proprietary companies with regard to its objects are as wide as those of public companies but in practice are restrictive in that if a proprietary company commences its operations in the real estate field it is likely to stay in that field for its total life. On the other hand public companies, and I refer particularly to listed public companies, although they may commence as mining exploration companies they have moved totally away from that form of operation, in some instances into real property development, manufacturer of cordials and similar fields of operations. Legislators must consider the question of the objects in Memoranda of Association of listed public companies being made much more restrictive than they are at present. For example, if you commence operations in a particular field be it mining or manufacturing, that company should stay in that field and be not allowed to move away unless you have an extraordinary meeting of shareholders called and a special resolution passed to that extent. I think this would prevent a number of the questionable deals between companies that we have heard about tonight. I would commend that the section of the Act relating to Memoranda of Association be made specially restrictive in relation to the incorporation of listed public companies.

My second point concerns s.122 of the Act which is the restrictive provision in relation to convicted persons. It in turn relates to ss.47, 124, 374C of the Act and sections of the Securities Industry Act to which in some instances small penalties are applicable (although civil remedies are available) and it is designed to prevent a convicted person from acting in the management of a company for five years. I know from my own experience that people affected by s.122 have waited and are waiting for the day when their five years of disqualification period are up to come right back into their management exercise again. I think the period of disqualification should be further structured and I think it ought to be structured on the basis of the form of the dishonest act committed and the penalty applying to the crime. I would point out that you can be convicted for conspiracy to cheat and defraud and other serious offences under the *Crimes Act* and although you face a period of imprisonment you can be granted suspended sentences. Consequently, you are restricted for five years on what may have been a major company fraud and yet in relation to a s.124 conviction where you may have been guilty solely for failure to use reasonable diligence in the discharge of your duties as a director you can be similarly restricted for five years. I do not think that the penalties for these two types of offences are synonymous in the context of the seriousness of the crime.

R. N. Purvis, A.C.A. Barrister-at-Law.

There are three matters arising from the papers and commentaries upon which I would specifically like, at short length, to comment this evening. They are:

firstly, the concept of a Company collapse necessarily resulting from the commission of a corporate crime;

secondly, investigations under s.176 being prejudicial; and

thirdly, the special jury.

Firstly, I do not believe that in the vast majority of instances the appointment of a Receiver to a company, or the making of a winding-up order results from the commission of a corporate crime.

In many cases the cause of a company collapse is inexperience or ineptitude on the part of the officers in the management of an enterprise, and the funding of its activities. Indeed, excessive confidence in one's own ability is more often the cause of a downfall than is a deliberate act or acts of a criminal nature.

Secondly, it seems to me that the provisions of the *Companies Act* as they relate to investigations are weighed very heavily against the person being examined and who may in due course be accused of having committed a corporate crime.

The provisions of s.176 of the Act compel a person to answer questions put to him by an inspector. The person being questioned is enabled to declare to the effect that, 'I object to answering on the ground that the answer might incriminate me,' but thereafter he is obliged, nevertheless, to answer such question. Very few people when being questioned by an investigator properly appreciate the significance of the questions being put to them, and that the answers which they give may well count against them in due course. Such answers unless so qualified, and provided they are relevant to a charge in due course laid, are admissible in proceedings.

I readily concede the necessity of inspectors being able to require persons to answer questions in order that proper steps might be taken to minimise the consequences upon shareholders, creditors, and the community at large of the position resulting from the acts of an officer. It does seem, however, that a person likely to be charged is entitled to protection such as is afforded to a person being examined under the provisions of the Bankruptcy Legislation.

Thirdly, I generally endorse the views expressed by Mr Ford in his paper with reference to a special jury. It seems to me that in relation to corporate criminal trials, and I here and elsewhere in these observations

refer to corporate crime in the sense used by Mr Farquhar, namely the prospectus, false statement, fraudulent misappropriation type situations, what is really needed is a jury comprised of peers of the person being tried. What we do not have today is a jury made up of people who are able to properly appreciate the nature of the particular acts that are being alleged, the environment and context in which those acts are committed, and the proper significance to be attached to them.

Section 124 of the *Companies Act* provides that a person may be charged with not using reasonable diligence in the discharge of the duties of his office. Whilst offences committed under this section can be dealt with summarily, the section illustrates the high degree of improbability that any ordinary group of people chosen at random from the community, but in practice excluding most professionals, public servants and senior businessmen, could properly assess the guilt or innocence of a person charged with such an offence. They would need to be reasonably conversant with what a diligent person in the environment of a corporate structure might or might not do, should or should not do, in the discharge of the duties of his office.

Surely what is here being considered is an alleged breach of commercial morality as defined by statute owed by an officer of a corporation to his co-directors, shareholders, creditors, and to the community at large. The commercial morality must be appreciated, and have been experienced by those called upon to assess such guilt or innocence.

Mr J. Parnell, Justice Department

Speaking specifically, I myself would applaud Mr Purvis' defence of the jury system as it stands. I think any modification of the jury system would destroy the whole rationale of the existence of the system.

Speaking generally, and having attended two previous seminars on corporate crime, I think that the Institute should initiate a research programme or an enquiry of some length, perhaps a year, into the whole administration of criminal justice in this State.

From my experience of his illuminating remarks on previous occasions I would suggest that Mr Justice Hutley should be invited to join any such research programme.

Lecturer, Law School, University of Adelaide.

I have attended a couple of seminars here on white collar crime and one of my problems has been the large number of topics encompassed by the various papers and by the commentaries. One of the points that I

would like to mention is simply the distinction between offences commited by corporations as opposed to offences committed by individuals. These topics have been considered together when, in fact, they are quite different. I want to instance this by referring to the paper presented by His Honour Judge Muir. A number of people have suggested that rehabilitation is quite inappropriate for individual company officers and those individuals who are charged with corporate crime offences.

On the other hand, in the context of corporate offenders rehabilitation starts to assume some sort of prospect. For example, if it is that within the corporation there are offences committed on behalf of the corporation we may start to think what can be done to reform or rehabilitate this particular corporation, and we might start to move in the following direction. We might think more in terms of preventive orders at any sign of trouble within the corporation. Let us anticipate future violations, let us encourage the courts to make preventive orders designed to encourage the adoption of measures designed specifically to avoid the repetition of various forms of criminal conduct. This to me is a type of rehabilitation, or type of reformation, particularly suited to corporate offenders as opposed to individual officers, and one of the bonuses in using such preventive orders would be that a greater focus could be placed upon individual responsibility.

Consider, for example, the prospect of preventive orders which require a corporation to specify with some degree of particularity which individual officers are in fact going to be responsible for udertaking various types of preventive programmes within the corporation. In the event of subsequent breaches, if we have these preventive orders, we have a much better chance of fairly and properly pinning criminal responsibility upon individual officers within the corporation.

That, of course, leads into all sorts of questions. What should we do by way of sentencing these individual officers? My basic point is that we need to draw a distinction between individual offenders as opposed to *corporate* offenders, and that in the context of corporate offenders it seems to me that reformation and/or rehabilitation offers some real prospect.

Adam Sutton, N.S.W. Bureau of Crime Statistics and Research.

There is just one brief thing I would like to say on behalf of my paper. I think it has been a bit misrepresented in the sense that there is a feeling that I have not dealt with corporate criminals as people who have committed crimes as part of their work in a company or on behalf of a company.

I think that if you look at the paper I have considered 243 cases altogether and 131 of those cases were cases of false pretences – which includes credit by fraud, conspiracy to defraud, making false statements and all offences arising from the issue of a false prospectus. I might not have covered all corporate offenders and I might not have covered only corporate offenders, but I do think that a lot of people that I have studied are corporate offenders. I still dispute the possibility of distinguishing between a corporate offender and a white collar criminal. His Honour Judge Muir mentioned the fact that I included cases involving valueless cheques in the study. Whatever the merits of such cases as being part of the study there were only five cases out of 243, so I do not think that they significantly affect the result.

CHAIRMAN'S SUMMARY

Crime committed by the 'respectable' or dealt with differently because of the social level of the offender is no new phenomenon. Alexander the Great once killed a colleague in a drunken brawl and set fire to the Palace at Persepolis. The barons who drafted Magna Carta were seeking rights for themselves more than the common people and on the international plane a great deal of murder or mayhem to inspire social change has been whitewashed by subsequent political transformation.

Events in America and India in our own times show how the position of the offender can modify the treatment of his offence. However politically or economically expedient, however, this is a situation not easy to countenance by any society based upon the rule of law and the concept of justice. Sutherlands labelling of 'white collar crime' in 1939 therefore, struck an echo of conscience in many states as it became increasingly appreciated that the criminal population either in the strict sense of law breakers or in the wider sense of inflicting damage or loss on others was really far greater than the numbers of unfortunates who are corralled by the criminal justice system for the more obvious and more easily prosecuted offences might seem to suggest.

In this seminar the term 'white collar crime' was defined by the Australian Attorney-General Mr Kep. Enderby in his opening address – crimes committed by persons of relatively high social status in the course of their business occupations including embezzlement, black marketing, company frauds, consumer fraud, restrictive trade practices: and several times in the discussions there were attempts to separate this concept from that of corporate crime and organised crime which whilst covering the same general area of offences brought in organisational elements and operations in scale which had rather special implications and consequences.

It was significant that in attempting to assess the magnitude and seriousness of white collar crime the Attorney-General was obliged to have recourse to United States estimates and projections. This underlined the paucity of Australian data on the subject and indicated a need for the kind of studies in this country which would give substance (or lie) to the suppositions based (necessarily at this time) on the experience of other countries. Behind the discussions which followed, there hovered several unanswered questions which it might be hoped that future studies may not overlook – namely – how much is white collar crime costing Australia? Just how extensive is this form of crime? What are the problems in the drafting and application of suitable legislation?

Though the seminar was handicapped by the scarcity of data in drawing boundary lines, the important and significance of white collar crime for Australia was never in doubt. The fact that it could cause death or serious injury when food and drug laws were flouted or that millions could be impoverished by illegal company manipulations or that the loss of Treasuries from exchange offences which smuggled most of the benefits of

honest labour out of a country were all indications of its gravity and were all cited as reasons why society should have a view of its crime much wider than that provided by the more obvious and dramatic street offences.

The seminar was asked to direct its attention specifically to the question of the capacity and suitability of the existing legal process for handling white collar crime. This led not only to a consideration of the problems in investigating and trying cases of white collar crime but to the appropriateness of the sentences imposed.

It was noted that there was the 1973 N.S.W. Law Reform Commission's Report on Business Records and the possibility of draft legislation to deal with specific issues of admissibility. There was s.4(4) of the Australian Constitution providing for a common informer type of action on the pecuniary interests of politicians: the *Australian Trade Practices Act* existed to deal with misleading and deceptive conduct in trade and commerce, with price fixing, collusive tendering and collective boycotts; there was also a federal law before the Senate on corporations and securities to provide penalties for stock market manipulations and a proposed National Companies Bill to curtail company activity contrary to public interest and in breach of a law: this brief survey also took account of Extradition Laws which needed up-dating from time to time.

With respect to legal proceedings the seminar considered the constitution of the Courts to hear complex fraud cases and the procedures likely to shorten the time to be taken over the hearings. It reviewed difficulties of inter-State documentation, the arguments for special juries and special tribunals to hear complicated commercial cases, the advantage of the *voire dire* examinations before juries are empanelled. It was thought there might be virtue in a procedure to enable the principal officers of a company to be examined publicly like bankrupts so that answers could be used in evidence even where they tended to incriminate; and reference was made to the averments provided for in the *Customs Act.* Most disturbing was the information provided to the seminar by officers concerned with investigations that summonses for 1973 cases were going out only in 1975 and that trials were going on for so long that not only is it difficult for witnesses to remember but they have time to die, move out of the area or be approached by those with interests in the hearing. There was such a continuing default in companies lodging Annual Returns that the Corporate Affairs Commission of New South Wales wondered how relevant its procedures were. The importance of making Directors of companies personally liable was stressed by some and countered by others who felt that it was becoming perilous to get involved in appointments to boards. The seminar seemed to have no doubts at all that in the existing state of legislation and trial procedures the legal system was unable to meet the challenge of white collar crime.

The seminar had the advantage of a short study of white collar offenders conducted by a New South Wales researcher. It was noted, however, that in selecting the group for presentation it had been necessary

to extend the concept of white collar crime to all violations of the law occurring in the course of a person's occupation. It had not been limited to those of so called 'high social status' because this might have involved circularity of argument. Perhaps not surprisingly it was observed that the characteristics and social backgrounds of these occupational offenders were much the same as those of persons in such professions and occupations who did not commit offences. It was apparent however the occupational offenders were generally in an older age group than criminals as a whole.

Finally, the seminar dealt with the penalties for white collar crime. There were those who felt that condign punishments were already being meted out to professional offenders who abused their positions of trust, those who felt that Directors should not be scapegoats and on the other side those who believed that since more vagrants than white collar offenders were sent to prison it was 'more heinous' to be poor but honest than to be dishonest. Clearly the first problem was to identify the offender, make him accountable and when he failed to get the offender before the courts with a greater degree of promptitude than was now being achieved. Secondly, a white collar offender, the Seminar thought, would need to be dealt with as *a criminal* – not as an errant servant whose respectability might itself be a shield – if only because his offence often had just as serious consequences for society as any street crime. Finally, the seminar appeared to agree that white collar crime provided a classic example of a situation in which the penalty should fit the crime as well as any particular needs of the offenders.

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